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Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Rachel Haas, Carol Haas, and Richard Haas
Petitioners,

v.

Quest Recovery Services, Inc. and State of Ohio
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

'CORRECTED' PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Should the Sixth Circuit have followed the holdings of the First, Ninth, and Eleventh Circuits which had recognized that Congress had abrogated Eleventh Amendment Immunity by adopting Title II of the Americans with Disabilities Act (ADA) and allowing States to be held liable for failing to comply with handicap accessibility requirements?

2. Is absolute judicial immunity applicable to sentencing orders that result in an individual suffering disparate treatment in violation of the Constitution and/or statutory law while in confinement?

3. When the U.S. Supreme Court remands a civil action to a court of appeals with instructions that the panel is "to consider the views of the United States", may the panel refuse to do so on the erroneous grounds that the plaintiff's pleadings fail to meet the minimal requirements imposed by Fed.R.Civ.P. 8(a)?

4. When a sixty (60) paragraph amended complaint is required to be prepared and submitted prior to the announcement of a U.S. Supreme Court decision which substantially modifies and clarifies the applicable principles of constitutional law, may an appellate court terminate the

proceedings on the basis that the claims for Title II ADA discrimination were not alleged with a high degree of particularity?

PARTIES TO THE PROCEEDING

Petitioners are Rachel Haas, Carol Haas, and Richard Haas. Petitioners are not corporate entities.

Respondent is the State of Ohio. Quest Recovery Services, Inc. and the City of Canton were defendants in the proceedings below but are not involved in the instant appeal.

Intervenor is the United States. Following the filing of Petitioners' first Petition for Writ of Certiorari in this Court, the United States sought to intervene "pursuant to 28 U.S.C. 2403(a), for the limited purpose of defending the constitutionality of an important federal civil rights law." *Brief of the United States as Intervenor, U.S. Sup. Ct., Case No. 06-263, p. I.*

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OPINIONS BELOW

The Opinions of the United States Court of Appeals for the Sixth Circuit have not reported and have been included in the Appendix at Appendices B & C.

The Opinion of the District Court for the Northern District of Ohio has been published 388 F. Supp.2d 797 and is included herewith in *Appendix E, p. 20e.*

JURISDICTION

The United States Court of Appeals for the Sixth Circuit's Order denying the Petition for Re-Hearing *En Banc* was issued on November 23, 2007. *Appendix A, p. 1a.* This Petition for Writ of Certiorari is filed within ninety (90) days of the issuance of that decision. *Sup.Ct.R. 13(3).* This Court's jurisdiction is invoked pursuant to 28 U.S.C. § § 1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Eleventh Amendment to the United States Constitution

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Fourteenth Amendment
to the United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Americans with Disabilities Act (Title II)
42 U.S.C. § 12132

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

STATEMENT OF THE CASE

A. Nature of the Case.

Petitioner, Rachel Haas, is a partial leg amputee who suffers from a number of other physical disabilities. She is seeking injunctive relief and damages as a result of the refusal of Respondent, State of Ohio, to comply with Title II of the Americans with Disabilities Act (ADA) with regard to state sponsored overnight drug and alcohol treatment programs. Her parents, Petitioners Carol and Richard Haas, have raised claims for loss of consortium.

B. Course of Proceedings.

Petitioners commenced this action against Defendants, Quest Recovery Services, Inc. (hereinafter "Quest") and the City of Canton (hereinafter the "City"), on March 1, 2004. *R. 1, Complaint; Appendix F at p. 37f.* The Complaint raised separate claims for Handicap Discrimination (Count I), Rehabilitation Act Violations (Count II), Civil Rights Violations (Count III), Negligence/Intentional Tort (Count IV), Infliction of Emotional Distress (Count V), and Loss of Consortium (Count VI). *Id.* It was alleged *inter alia* that Petitioner, Rachel Haas, had suffered serious injury, humiliation, and distress while attending a six day non-handicap equipped driver intervention program (DIP) in Massillon, Ohio.[1] Quest had operated the program in a building owned by

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[1] Petitioner had been permanently crippled in an ATV/truck accident. She was convicted of driving while intoxicated in connection with the incident and ordered, as part of her sentence, to complete the six day Driver Intervention Program as an alternative to incarceration.

Respondent, State of Ohio. Participants were required to stay overnight. Both Defendants submitted Answers denying liability. No challenges were raised to federal jurisdiction under 28 U.S.C. §1331 (Federal Question) and 28 U.S.C. §1343 (Civil Rights and Elective Franchise).

On May 24, 2004, the City filed a Motion to Dismiss pursuant to Fed.R.Civ.P. 12(B)(6). *R. 14.* The municipality argued that only the State government had been involved with the operation of the DIP and the housing of the participants. Having no reason to dispute the numerous authorities cited therein, Petitioners voluntarily agreed to dismiss all claims against the City on May 27, 2004. *R. 17, Joint Notice of Partial Dismissal.*

At the same time, Petitioners submitted their Unopposed Motion for Leave to File First Amended Complaint. *R. 18.* This request was granted on June 9, 2004, *R. 19, Marginal Order*, and the revised pleading was filed on June 11, 2004, *R. 25, First Amended Complaint; Appendix G, p. 52g.* Respondent, State of Ohio (hereinafter the "State"), was joined to the proceedings therein. The theories of recovery remained the same, except the claim for civil rights violations under 42 U.S.C. §1983 (Count III) were abandoned. Both Quest and the State again submitted Answers denying liability. *R. 26 & 35.*

On August 10, 2004, the State moved for dismissal pursuant to Fed.R.Civ.P. 12(b)(6) (hereinafter "Defendant's Motion"). *R. 36, Motion to Dismiss.* It was argued therein that judgment should be granted under Fed.R.Civ.P. 12(b)(1) and (6) because (1) a valid claim for relief had not been stated and (2) Eleventh Amendment immunity barred any recovery. Petitioners' timely response was submitted on August

27, 2004. The State's Reply followed on September 13, 2004.

C. Disposition Below.

In a ruling dated September 20, 2004, Judge James S. Gwin granted the State's Motion only in part. *District Order, Appendix E, p. 20e.* In his opinion, he concluded that the Eleventh Amendment had been properly abrogated for purposes of the Rehabilitation Act but not the ADA. *R. 47, Opinion and Memorandum, pp. 4-11; Appendix E, pp. 24e-31e.* It was further determined that while a claim for "direct discrimination" could not be maintained, the pleading did allege a potentially viable *Johnson* claim against the State as the owner of the building and grounds where the alcohol treatment program was conducted. *Id., pp. 14-15; Appendix E, pp. 34e-35e.* Following this ruling, the parties proceeded to prepare for trial.

Eventually, Petitioners reached a settlement agreement with Quest which resulted in a dismissal of all claims against the company on December 14, 2004. *R. 86, Notice of Dismissal.* Shortly before trial, Petitioners and the State entered their own partial settlement. By stipulation, all pending claims were dismissed. *R. 90, Order.*[2] The parties' written release specifically provided that Petitioners retained their right to appeal the dismissal of their claim against the State under the ADA.

Petitioners commenced a timely appeal to the Sixth Circuit. The Court's opinion was issued on March 27, 2006. *Appendix C, appended hereto.* Oddly, it was concluded that:

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[2] This entry was supplanted by a further Order dated January 28, 2005. *R. 94, Order.*

> The district court correctly found that [Petitioners] did not sufficiently plead that the State of Ohio is responsible for Quest's alleged wrongdoing. The first amended complaint is deficient because it does not satisfy our pleading requirements under *Johnson* for imposing liability upon the State of Ohio.

Sixth Circuit Opinion, p. 9; Appendix C, p. 15c. Actually, the District Judge had not found that the pleadings were defective with regard to the claim that the State could be liable in accordance with *Johnson v. City of Saline*, 151 F.3d 564, 571 (6th Cir. 1998), due to its ownership of a public building that was not handicap compliant. *District Court Opinion, p. 14; Appendix E, p. 33e.* No explanation was provided by the Sixth Circuit for how he erred in this regard. The appellate court did find, as the District Judge had, that Congress had violated the State's Eleventh Amendment immunity in enacting Title II of the ADA. *Sixth Circuit Opinion, pp. 6-13; Appendix C, pp. 11c-18c.*

Petitioners filed a timely Petition for Writ for Certiorari in this Court on June 23, 2006. *Sup.Ct. Case No. 06-263.* No Brief was submitted by the State in opposition. On September 29, 2006, the United States moved to intervene in the proceedings in accordance with 28 U.S.C. §2403(a). The government identified the Question Presented as follows:

> The United States is seeking to intervene in this litigation, pursuant to 28 U.S.C. 2403(a), for the limited purpose of defending the constitutionality of an important federal civil rights law. This brief accordingly addresses only the first

question presented by the petition:

> Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 to 12165, is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, as applied to correctional programs and services. [emphasis added]

Brief of the United States as Intervenor, p. I. With leave of court, the State then submitted a Brief on December 15, 2006 urging this Court to decline to consider the matter further. Petitioners' Reply was filed on December 22, 2006.

In an Order dated January 16, 2007, the United States was granted leave by the Supreme Court to intervene in the proceedings. An Entry was issued that same day declaring:

> *** The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of 28 U.S.C. §24303(a) to consider the views of the United States. [emphasis added]

Haas v. Quest Recovery Servs., ___ U.S. ___, 127 S.Ct. 1121, 166 L.Ed.2d 888 (2007). Justice Ginsburg furnished a concurring opinion questioning the basis for the Sixth Circuit's "alternative rulings", which were described as "puzzling". *Id.*

On remand, the parties were instructed to file "letter briefs" addressing the views of the Intervenor. The panel then issued its Opinion on Remand on August 21, 2007. *Appendix B, p. 2b.* The Sixth Circuit

again refused to reexamine its holding that Title II violated the Eleventh Amendment, which had been the focus of the United States' intervention Brief, and concluded instead that the Amended Complaint still failed to meet the notice-pleading requirements set forth in Fed.R.Civ.P. 8(a). *Id.* No discernable attempt was made to address any of the concerns in the prior opinion that had been identified by Justice Ginsburg. Petitioners filed a timely Petition for Re-Hearing *En Banc*, which was denied in an Order dated November 23, 2007. *Appendix A, p. 1a.* Petitioners now seek further review in the Supreme Court of the United States.

ARGUMENT FOR GRANTING WRIT

I The Opinion of the Sixth Circuit Court of Appeals squarely conflicts with decisions of the First, Ninth, and Eleventh Circuit Courts of Appeal and unjustifiably subverts Congressional intent to redress all forms of governmental handicap discrimination through Title II of the Americans with Disabilities Act.

A. Overview.

This Court justly granted certiorari previously in these proceedings and should do so again now. After this action was returned to the Sixth Circuit, the panel plainly did not comply with the instructions "to consider the views of the United States." *Haas*, 127 S.Ct. at 1121. Title II or the ADA remains largely unenforceable in the Sixth Circuit as a result of outdated precedent. The federal government had determined that this case was sufficiently monumental to warrant intervention "for the limited purpose of

defending the constitutionality of an important federal civil rights law." *Brief of United States as Intervenor, U.S. Sup. Ct., Case No. 06-263, p. I.*

Title II of the ADA seeks to eradicate handicap discrimination suffered in connection with public services by allowing injunctive relief and damage awards to be sought against governmental entities, including the states. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675, 121 S.Ct. 1879, 1889, 149 L.E.2d 904 (2001); *Helen L. v. DiDario*, 46 F.3d 325, 335 (3rd Cir. 1995). Because the Sixth Circuit is plainly dodging the issue, the citizens of Ohio, Kentucky, Tennessee, and Michigan do not enjoy the full benefits and protections which Congress intended to establish through this vital enactment. In contrast to other Circuits which have held that the enactment is fully enforceable, the Sixth Circuit clings to the peculiar view that Title II remedies are available against states only in the rare instance that the ADA claim happens to involve "due process" rights to access to a courthouse. *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002) (*en banc*). As Petitioners and the United States were attempting to establish, *Popovich's* holding that Title II is largely unconstitutional is no longer viable in light of recent Supreme Court opinions.

B. Implications of *U.S. v Georgia.*

The notion that the Eleventh Amendment immunity may be avoided only when an ADA claimant's due process rights are at stake has been tacitly rejected by this and other federal courts. After the appeal was briefed and argued in the Sixth Circuit, the U.S. Supreme Court issued *United States v. Georgia*, 546 U.S. 151, 126 S.Ct. 877, 881-882, 163 L.Ed.2d 650 (2006). That lawsuit involved a

paraplegic state prison inmate seeking damages under Title II of the ADA. *Id.*, 546 U.S. at 879. No meaningful due process rights were alleged to have been violated. The similarities to the instant action were not lost upon the Solicitor General, who has observed that:

> That decision arose, moreover, in the context of claims like [Plaintiffs'] concerning inaccessible correctional facilities and damages for injuries suffered as a result of such inaccessibility. Compare *Georgia*, 126 S. Ct. at 879 (alleging inaccessible bathroom facilities and correctional programs), with Pet. App. 3a-4a (same).

Sup. Ct. Brief for the United States as Intervenor, p. 7. Writing for the unanimous Court, Justice Antonin Scalia reasoned in *Georgia* that:

> While the Members of this Court have disagreed regarding the scope of Congress's "prophylactic" enforcement powers under § 5 of the Fourteenth Amendment, *** no one doubts that § 5 grants Congress the power to "enforce... the provisions" of the Amendment by creating private remedies against the States for *actual* violations of those provisions. "Section 5 authorizes Congress to create a cause of action through which the citizen may vindicate his Fourteenth Amendment rights." *** This enforcement power includes the power to abrogate state sovereign immunity by authorizing private suits for damages against the States. *** Thus,

> insofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity. [italics original; underlining added; citations omitted]

Georgia, 546 U.S. at 881-882. The high court proceeded to hold that a remand was necessary in order to permit the inmate to revise his pleadings to focus upon discriminatory practices violative of the Fourteenth Amendment. *Id.*, at 881-882. As the United States has observed, the Sixth Circuit's analysis in the instant appeal was irreconcilable with *Georgia* since the panel had proceeded to rule in favor of the State, without first addressing "whether any of [Plaintiffs'] claims seek relief 'against the State[] for conduct that *actually* violates the Fourteenth Amendment,' 126 S.Ct. at 882. *Sup. Ct. Brief for the United States as Intervenor, pp. 8-9.*

C. Petitioners' Equal Protection Claim.

Like the convict in *Georgia*, 546 U.S. 151, Petitioner Rachel Haas has sufficiently alleged that her rudimentary Fourth Amendment rights were violated by the State's disparate treatment of her, which was the result of policies lacking any rational basis. While she did not include explicit citations to the "Fourteenth Amendment" in the pre-*Georgia* First Amended Complaint, even the District Court recognized that "Plaintiffs' ADA claims against Ohio sound in equal protection".[3] *Haas v. Quest Rec. Servs.*,

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[3] Rather obviously, Petitioners did not seek relief for violations of their "constitutional right[s]" under 42 U.S.C. §1983 because it is well-settled that the

338 F.Supp.2d 797, 803 (N.D. Ohio 2004). Petitioners not only alleged unlawful discriminatory practices in their pleadings, but also established during the summary judgment phase of the proceedings that disabled individuals (most notably Petitioner Rachel Haas) were suffering onerous disparate mistreatment by being confined in State-owned facilities that were far from handicap compliant.[4]

Eleventh Amendment does bar such claims. *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); *Alabama v. Pugh*, 438 U.S. 781, 782, 98 S.Ct. 3057, 3058, 57 L.Ed.2d 1114 (1978). This immunity has been overridden by Title II of the ADA (at least in the First, Ninth, and Eleventh Circuits) and Petitioners' claim of disability discrimination against the State was thus predicated strictly upon this federal statute. In effect, Title II furnishes a damages remedy against States for Fourteenth Amendment violations that §1983 did not. It should also be remembered, moreover, that Petitioners were required to prepare their First Amended Complaint without the benefit of *Georgia*, 546 U.S. 151.

[4] A duly authenticated architectural report was attached to Petitioners' Revised Motion for Partial Summary Judgment on Counts I and II of September 30, 2004 as Exhibit A. The materials were submitted during the summary judgment phase of the proceedings and did not in any sense alter the allegations contained in the First Amended Complaint. Given that this lawsuit is – above all else – a search for the truth, the additional information that has been furnished should be considered in evaluating whether a potentially valid claim for relief has been stated. *American Inter-Fidelity Exchange v. American Re-*

No evidence was ever submitted disputing that (1) the State owned the building at issue, (2) the facility failed to meet federally mandated handicap accessibility requirements, and (3) Petitioner suffered personal injury, embarrassment, and substantial hardship as a result that her non-disabled counterparts were not required to endure. No attempt has ever been made to identify a rational basis for the State's decision not to furnish handicap accessible DIP facilities. Consequently, clear and unmistakable violations of the equal protection guarantees of the Fourteenth Amendment had been alleged – if not conclusively proven – by Petitioners.[5] *Cleburne v. Cleburne Living Cntr.*, 473 U.S. 432, 448, 105 S.Ct. 3249, 3258, 87 L.Ed.2d 313 (1985). In accordance with the opinion that was recently issued in *Georgia*, 546 U.S. 151, Section 5 plainly permits such "actual violations" to be remedied and there is no need for any inquiry into the "congruence and proportionality" of Congress' efforts to eradicate handicap discrimination prophylactically.

Petitioners' "landlord liability" theory of recovery

Insurance Co., 17 F.3d 1018, 1021-1022 (7th Cir. 1994); *Daush v. Rykes*, 52 F.3d 1425, 1427 fn. 3 (7th Cir. 1994). Turning a blind eye towards the facts that have been developed during the summary judgment proceedings would hardly serve the interests of justice.

[5] The Sixth Circuit had observed that the Fourteenth Amendment requires "only" rational basis review when the handicapped are involved. *Appendix C, Opinion of March 27, 2006, p. 12.* No explanation has been offered, however, as to how a "rational basis" can exist for the State's refusal to furnish handicap accessible DIP facilities. *Cleburne*, 473 U.S. at 448.

had previously been recognized in the Sixth Circuit (and elsewhere). In *Johnson,* 151 F.3d 564, the Court examined a case in which a disabled plaintiff filed a claim against the city because the second floor of a city-owned radio station building he was required to use in his business was allegedly inaccessible to him. The District Court rejected his Title II claim in part on the grounds that he was leasing the premises from the municipality and was thus solely responsible for providing the accommodations. *Id.,* at 571. Writing for the majority, Judge Boggs explained on appeal that:

> Though it was run by [plaintiff], the station was located in a city building, and operated there rent free. It is clear from the Technical Assistance Manual construing Title II that public entities have a duty to provide accessible facilities even when those facilities are used by contractors. As noted above, the Manual is entitled to substantial deference for this interpretation of Title II. The Technical Assistance Manual gives the specific example of a city-owned building in which the first floor is leased by private businesses. Even though the businesses may be subject to Title III of the ADA (42 U.S.C. §12181 *et seq.*, regarding public accommodations), the city is simultaneously subject to Title II because it is a landlord. TITLE II TECHNICAL ASSISTANCE MANUAL §1.3000. This section applies here: the city definitely is a landlord, required by Title II to reasonably accommodate the disabled public. [emphasis added]

Id., at 571-572. Quite clearly, the State could not circumvent its "duties" under Title II of the ADA in the case *sub judice* with a sublease of the premises to Quest Recovery Services, Inc.

D. The Conflict Over the "Due Process Only" Standard.

As is the case with countless other victims of state-sponsored handicap discrimination, Title II remedies are unavailable to Petitioner because the Sixth Circuit persists in abiding by the *en banc* ruling in *Popovich*, 276 F.3d 808, which holds that Eleventh Amendment immunity has been abrogated for purposes of Title II only in those rare instances where some form of the "due process" right of access to the courts have been violated. This counterintuitive reasoning cannot be reconciled with *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 123 S.Ct. 1972, 155 L.Ed.2d 93 (2003), which involved nothing more than a male state employee's purely "equal protection" right to be free from impermissible gender discrimination. The Sixth Circuit responded to this development in the instant action by drawing a line between gender and handicap discrimination based upon the "heightened level of constitutional scrutiny" that is owed to the former two classifications. *Appendix C, Opinion of March 27, 2006, p. 12.* That artificial demarcation now cannot be harmonized with *Georgia*, 546 U.S. 151, which was also brought by a handicapped prison inmate. It is now evident that the Supreme Court does not share the view that the disabled are deserving of less protection than others under appropriate Eleventh Amendment review.

The Brief for the United States as Intervenor forcefully demonstrates that the federal appellate courts are now split over whether Congress is confined

to just remedying discrimination that also entails due process concerns. The Sixth Circuit's "due process only" standard was tacitly rejected not long ago in *Toledo v. Sanchez*, 454 F.3d 24 (1st Cir. 2006). Even though a student suffering from schizoaffective disorder had not established that he had been denied access to the courts, the First Circuit concluded that his ADA claim against a state university was viable since the congressional response to pervasive handicap discrimination in public education satisfied the "congruence and proportionality" test identified in *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624. *Toledo*, 454 F.3d at 40.

In *Phiffer v. Columbia Riv. Corr. Inst.*, 384 F.3d 791, 792-793 (9th Cir. 2004), the Ninth Circuit held that Congress had completely abrogated Eleventh Amendment immunity with regard to all types of Title II ADA claims.[6] Since no exceptions or limitations were established for this broad rule, it is evident that the instant Petitioners' claim would have been viable in that jurisdiction. In the proceedings below District Judge Gwin dismissed *Phiffer* on the grounds that "the Ninth Circuit applies a different analysis than the Sixth Circuit precedent that guides this Court ***." *District Court Order, p. 9; Appendix E, p. 29e.*

The Ninth Circuit's more expansive view of

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[6] This Conclusion was reached even after this Court had directed the Ninth Circuit to consider the implications of the recent ruling in *Lane*, 541 U.S. 509. *Columbia Riv. Corr. Inst. v. Phiffer*, 541 U.S. 1059, 124 S. Ct. 2386, 158 L.Ed.2d 960 (2004). A second request for *certiorari* was then denied. *Columbia Riv. Corr. Inst. v. Phiffer*, ____ U.S. ___, 126 S. Ct. 1140, 163 L.Ed.2d 999.

Congressional authority is also shared by the Eleventh Circuit. In *Association for Disabled Americans v. Florida Intl. Univ.*, 405 F.3d 954 (11th Cir. 2005), it was held that a state university could be sued under Title II of the ADA for failing to provide sign language interpreters and necessary aides to deaf students. Such a claim would have been subject to a quick dismissal in the Sixth Circuit because only those protected classes "entitled to a heightened level of constitutional scrutiny" can avoid Eleventh Amendment immunity. *Sixth Circuit Opinion, p. 12; Appendix C, p. 18c.* The plaintiffs in *Association for Disabled Americans* were allowed to proceed, on the other hand, with a discrimination claim based solely upon their right to access to educational services. *Id.*, 405 F.3d at 957-958. As the Eleventh Circuit openly acknowledged, "classifications relating to education only involve rational basis review", *Id.* at 957, which is precisely what led the Sixth Circuit to conclude that the handicap cannot surmount the Eleventh Amendment. *Sixth Circuit Opinion, p. 12; Appendix C, p. 18c.*

Apart from the conflict amongst the circuit courts, the United States has offered a second criticism of the Sixth Circuit, which centers upon an issue that Petitioners had been pressing throughout these proceedings without success. The refusal in the Sixth Circuit to recognize any abrogation of the Eleventh Amendment beyond the realm of due process is inconsistent with the holding of *Tennessee v. Lane*, 541 U.S. 509, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004). The Solicitor General has reasoned that:

> [T]he court of appeals' holding that *Lane* has no relevance outside of court-access cases conflicts with the Fourth Circuit's

> decision in *Constantine v. Rectors & Visitors of George Mason University*, 411 F.3d 474 (2005). In *Constantine*, which involved Title II's application to public education, the Fourth Circuit held that *Lane's* analysis precluded adherence to prior circuit precedent holding Title II's abrogation unconstitutional in its entirety. *Id.* at 486 n.8 (*Lane* renders the reasoning that underlay prior circuit precedent "obsolete").
>
> The court of appeals' misapplication of *Lane* provides an additional basis to vacate the judgment below ***.

Sup. Ct. Brief of United States as Intervenor, p. 13. The time has now come for this Court to dispel the unduly restrictive view of Congressional authority that was adopted in *Popovich*, 276 F.3d 808, which does not appear to have been embraced by any court outside the Sixth Circuit in the post-*Georgia* era.

> **II. The Sixth Circuit's overly expansive view of absolute judicial immunity now permits governmental entities in that jurisdiction to discriminate with impunity against anyone who is subject to a judicial order.**

The Sixth Circuit also held in the original opinion that Petitioners' entire cause of action was barred by the doctrine of absolute judicial immunity. *Sixth Circuit Opinion, pp. 7-8; Appendix C, pp. 13c-14c.* The panel's reasoning was that Petitioner Rachel Haas' claim that she had been ordered to be confined in a non-handicap accessible facility was really "an attempt to sue the municipal court judge." *Id., at 7;*

Appendix C, p. 13c. Since the Judge "clearly was acting both within his jurisdiction and within his judicial capacity when he issued an order sentencing [Petitioner] to two six-day driver intervention programs" no claim could be pursued against the State. *Id., pp. 7-8; Appendix C, pp. 13c-14c.*

After the appeal was returned to the Sixth Circuit by this Court, the panel continued to insist that the only identifiable "state actor" was the municipal court judge. *Appendix B, p. 4b.* The Court refused to acknowledge that numerous other state administrators and bureaucrats would have been far more likely to have been responsible for the fact that the State-owned building where the DIP classes were being held was far from handicap compliant. *Id.* By artificially constraining Petitioners' claims to an assault upon the "municipal court judge", the Sixth Circuit was able to return to the mantra of "absolute judicial immunity". *Id.*

If allowed to stand, the consequences of this myopic ruling will be profound. This Court recognized some time ago that handicapped inmates are entitled to pursue otherwise valid Title II ADA claims based on disparate treatment suffered in connection with their sentences and confinement. *Pennsylvania Dept. of Corr. v. Yeskey*, 524 U.S. 206, 118 S. Ct. 1952, 141 L.Ed.2d 215 (1998). Since all such prisoners are, by necessity, subject to a judge's sentencing order, no such claim can now be pursued in the Sixth Circuit. Ordering a disabled individual to be confined in a non-handicap compliant facility is now protected by absolute judicial immunity. *Sixth Circuit Opinion, pp. 7-8; Appendix C, pp. 13c-14c.*

Even more troubling, the appellate court's short-sighted ruling paves the way for the creation for

special prisons for blacks, Hispanics, Arabs, and other minorities. So long as a judge has ordered the individual to be confined in the segregated facility "absolute judicial immunity" will attach and preclude even a constitutional claim from being filed under 42 U.S.C. §1983 or any other provision of law.[7] Even where (as in Petitioners' case) these minority-only facilities subject their occupants to harsher and more onerous treatment than the general prison population, no redress will be available

The Sixth Circuit's overly broad application of judicial immunity is disturbing. As established in *Johnson*, 151 F.3d at 571-572, the State was required to ensure, as a landlord, that its building complied with federal regulations designed to protect the disabled. This was not done and Petitioner suffered a nightmarish experience over six days that her non-disabled counterparts were not required to endure. Immunizing the State from the liability that Congress has elected to impose through Title II on the grounds that Petitioner was subject at the time to a valid court sentencing order is both illogical and antithetical to the noble objectives of the ADA.

The lower courts' immunity analysis fails to account for the critical distinction between judicial and ministerial acts. Petitioner has never challenged the length, terms, and conditions of the sentence that Municipal Judge Kubilus imposed upon her. Her

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[7] When judicial immunity applies, not even constitutional rights can be vindicated. *Pierson v. Ray*, 386 U.S. 547, 87 S. Ct. 1213, 18 L.Ed.2d 288 (1967); *Mireles v. Waco*, 502 U.S. 9, 112 S. Ct. 286, 116 L.Ed.2d 9 (1991). Great care must therefore be taken in defining the contours of this powerful privilege.

position is that Title II of the ADA requires that she be allowed to fully participate in and benefit from the drug/alcohol treatment programs that were being provided to non-handicapped DUI offenders as an alternative to incarceration. *42 U.S.C. §12132.* Judicial immunity is unavailable for ministerial acts performed during the course of a legal proceeding, even when undertaken by a judge. *Ex parte Commonwealth of Virginia,* 100 U.S. at 348; *Forrester v. White,* 484 U.S. 219, 227-229, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988); *Duvall v. County of Kitsap,* 260 F.3d 1124, 1133-1135 (9th Cir. 2001). The decision of whether or not to offer a handicap accessible DIP facility to disabled offenders could have been made by a court administrator, departmental chief, or some other non-judicial state officer or employee. Indeed, there is no reason whatsoever to believe that Municipal Judge Kubilus had intended for Petitioner to be confined in a non-compliant facility. No logical reason exists for cloaking the State's refusal to comply with Title II with absolute judicial immunity.

III. Petitioners' First Amended Complaint alleging a claim of Title II disability discrimination satisfies the notice-pleading requirements imposed by Fed.R.Civ.P. 8(a), particularly given that the pleading was prepared without the benefit of *Georgia*, 546 U.S. 151.

As with the original Opinion which had been issued earlier in this protracted appeal (*Appendix C*), the Sixth Circuit's remand order refuses to consider the continued viability of *Popovich*, 276 F.3d 808, by imposing exceedingly high pleading requirements upon Petitioners. Not a single Justice on the Supreme Court had expressed any concern over the sufficiency

of the First Amended Complaint at the time that the proceedings were remanded to the appellate court for consideration of the United States' views. *Haas*, 127 S.Ct. 1121. This pleading had been attached as Appendix E to the Petition for Writ of Certiorari and, it is safe to assume, there would have been no point in ordering a remand if this Court had been in agreement with the Sixth Circuit that Petitioners had failed to meet the notice-pleading requirements set forth in Fed.R.Civ.P. 8(a). In her concurring opinion, Justice Ginsburg addressed the appellate panel's ruling in this regard and reasoned that:

> *** [P]etitioners asserted, as a discrete basis for Ohio's liability, the State's ownership of the building housing the private correctional facility to which Haas as assigned. See Dept. of Justice, Civil Rights Division, Disability Rights Section, Americans with Disabilities Act: Title II Technical Assistance Manual § 1.3000 (Nov. 1993) (explaining that a public entity may be liable as a landlord). The Sixth Circuit held that petitioners failed to satisfy special "pleading requirements" set forth in *Johnson v. Saline*, 151 F.3d 564 (1998), for alleging a claim against Ohio as a landlord. Under this Court's jurisprudence, however, federal courts ordinarily have no warrant to impose heightened pleading standards not prescribed by statute or rule. See, *e.g., Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993). Neither *Johnson* nor the decision at hand offers any

> justification for applying special pleading rules to Title II claims. [emphasis added]

Id. Justice Ginsburg's concurrence concluded with a simple request.

> If, on remand, the Court of Appeals again holds that petitioners failed to state a claim under Title II, this Court would benefit from a fuller statement of the reasons underlying that decision.

Id., p. 1.[8]

This request was ignored upon remand and the Sixth Circuit simply devised new grounds for concluding that the First Amended Complaint was still fatally defective. *Appendix B, p. 6b.* District Judge Avern Cohn (sitting by assignment), opined for the panel that Petitioners had failed to (1) specifically name a "state actor", (2) allege that the building at issue was constructed at a time that would avoid application of the ADA's grandfather clause, and (3) otherwise establish an entitlement to recovery under the principles established in *Georgia*, 546 U.S. 151. *Id., pp. 5b-6b.* Notably, the panel had not expressed any concern with these supposed pleading deficiencies in the original opinion which had been issued on

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[8] Justice Ginsburg also inquired as to whether the settlement agreement that had been entered between the parties with respect to the Rehabilitation Act claim also barred a landlord liability theory under Title II of the ADA. *Haas*, 127 S.Ct. at 1121. In a Letter Brief that was issued to the Sixth Circuit on April 19, 2007 upon remand, the State acknowledged that the Title II claim had been specifically excluded from the scope of the Release.

March 27, 2006. *Appendix C, p. 7c.* The Sixth Circuit's rejection of the pleading had been based at that time upon completely different "defects", which Justice Ginsburg cogently addressed in her concurring opinion. *Haas,* 127 S.Ct. at 1121 (Ginsburg, J., concurring).

The manifest unfairness of the Sixth Circuit's elevated pleading standard for Title II claimants is aptly reflected by the second opinion's heavy reliance upon *Georgia*, 546 U.S. 151. *Appendix B, pp. 5b-6b.* That seminal decision was not released until January 10, 2006, which was roughly nineteen (19) months after the First Amended Complaint had been filed.[9] *Appendix G, p. 52g.* As previously established herein, the *Georgia* opinion furnished considerable clarification with regard to how Eleventh Amendment immunity is to be analyzed in connection with claims sounding in equal protection. The appellate court's harsh criticisms of Petitioners for failing to anticipate this substantial modification in the law and fashion their pleading accordingly should be rectified by this Court.

The Sixth Circuit's post-remand grounds for rejecting the First Amended Complaint are patently nonsensical. First, it was observed that:

> As an initial matter, the Amended Complaint does not name in its caption any state actor.

Id., p. 3. What federal law or rule requires a "state

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[9] Indeed, the parties briefing in the appeal to the Sixth Circuit had been completed and oral argument had been concluded at the time that *Georgia* was issued.

actor" to be named in the caption of a pleading?[10] The only Defendant remaining in this action, State of Ohio, is unquestionably a sovereign entity capable of being sued. *Southern Gum Co. v. Laylin*, 66 Ohio St. 578, 64 N.E. 564 (1902), paragraph one of the syllabus; *State v. Bob Manashian Painting*, 121 Ohio Misc.2d 99, 782 N.E.2d 701, 704-705 (Cuy. C.P. 2002). As Justice Ginsburg has observed, Petitioners' Title II claim is based upon "the State's ownership of the building housing and private correctional facility to which [she] was assigned." *Haas,* 127 S.Ct. at 1121. The "state actors" who are most likely at fault for the State's failure to comply, as landlord, with mandatory handicap accessibility requirements are the officials and employees who never bothered to inspect the facility and consult the applicable regulations. Even if it were somehow appropriate for Petitioners to sue such individuals for damages when they were plainly acting within their official capacities, this hardly means that the lawful owner of the structure – the State of Ohio – is an improper party.

The First Amended Complaint was also found to be defective because:

> Here, the [Plaintiffs] do not allege that the building was built after the enactment of the ADA or if built earlier,

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[10] The Court may be referring to an Ohio statute that requires state departments and agencies to be identified in complaints filed in the Ohio Court of Claims. *O.R.C. §2743.13(A).* This enactment serves purely administrative functions, is plainly procedural, and can have no relevance in a federal lawsuit. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

> that it was renovated after that date. They allege no facts regarding the State of Ohio's obligations under the ADA with respect to the Quest facility or regarding the Quest facility itself.

Appendix B, p. 6b. In its Brief to the appellate court, not even the State had suggested the Petitioners were required to include such minute details in their Complaint.[11] This argument was first raised by the State following remand in a Letter Brief that was submitted on April 19, 2007 and, as a result, Petitioners were precluded from responding.

Just as Justice Ginsburg had observed previously, the appellate court is again imposing a heightened pleading standard upon ADA claimants that has no basis in the law. It is simply unrealistic to expect that, before any discovery can be conducted, a pleader should be able to identify the date that a non-

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[11] Prior to the Supreme Court's remand, the State's seemingly endless nit-picking with Petitioners' pleadings was founded upon the notion that "direct discrimination" must be alleged for any Title II claim to succeed. *Final Brief of Appellee State of Ohio, pp. 9-10.* In other words, the State seemed to feel at the time that unless one of its officers, employees, or agents has taken affirmative steps to purposely discriminate against a handicapped individual, Title II liability can never be imposed. The Sixth Circuit's decision in *Johnson*, 151 F.3d 564, contains no such requirement. Building owners (including the government) cannot avoid the consequences of their failure to abide by their "duty" to implement handicap accessibility requirements simply by claiming that no one acted "directly" and "deliberately" to discriminate.

handicap accessible building was constructed and identify each renovation that was thereafter undertaken.[12] No attempt has been made by the panel to explain, as Justice Ginsburg had requested, why the Sixth Circuit expects ADA claimants to furnish

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[12] By all appearances, the Sixth Circuit is the first to hold that an ADA complaint must anticipate and preempt any defense arguments based upon regulatory "grandfather clauses". *Appendix B, p. 5b-6b.* Far less onerous pleading standards are followed in other jurisdictions, as it was recognized in *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002), that:

> To state a claim of disability discrimination under Title II, the plaintiff must allege four elements: (1) the plaintiff is an individual with a disability; (2) the plaintiff is otherwise qualified to participate in or receive the benefit of some public entity's services, programs, or activities; (3) the plaintiff was either excluded from participation in or denied the benefits of the public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (4) such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability. [citation omitted]

See also *Stevens v. Harper*, 213 F.R.D. 358, 374 (E.D. Cal. 2002); *McIntyre v. Robinson*, 126 F.Supp.2d 394, 408 (D. Md. 2000). Neither the State, nor the Sixth Circuit, has ever suggested that Petitioners have failed to allege these basic elements of an ADA claim.

substantially more than just "a short and plain statement of the claim showing that the pleader is entitled to relief". *Fed.R.Civ.P. 8(a).* When viewed in their entirety, the detailed allegations appearing in the First Amended Complaint are more than sufficient to satisfy the liberal pleading requirements imposed by the Civil Rules.[13] *In re NationsMart Corp. Sec. Lit.*, 130 F.3d 309, 315-316 (8th Cir. 1997); *New York State Waterways Assn. v. Diamond*, 469 F.2d 419, 421 (2nd Cir. 1972). It is difficult to believe, moreover, that this high court would have bothered to grant *certiorari* and ordered a remand for consideration of the federal government's position if the pleading that was attached to the first Petition for Certiorari was really was fatally defective.

In the second decision upon remand, the panel plainly lost sight of the standard of review applicable to dismissals on the pleadings.[14] The opinion declares

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[13] It should not be forgotten that the pleadings must be liberally construed for the purpose of determining whether a cause of action has been sufficiently stated. *Ott v. Midland-Ross Corp.*, 523 F.2d 1367, 1369 (6th Cir. 1975). In accordance with *Fed .R. Civ. P. 8(e)*, such filings should be interpreted in a manner which achieves substantial justice. *Hazen v. Western Union Telegraph Co.*, 518 F.2d 766, 770 (6th Cir. 1975). Courts should be mindful that only a "short and plain statement of the claim" is required. *Michaels Building Co. v. Ameritrust Co.*, 848 F.2d 674, 679 (6th Cir. 1988).

[14] Even the State recognized that: "When deciding a motion to dismiss, a court must construe the allegations contained in the complaint in favor of the plaintiff, *Scheurer v. Rhodes*, 416 U.S. 232, 236 (1974),

that:

> We agree with the State of Ohio that its driver intervention programs ("DIPs"), when viewed in their entirety, are readily accessible to and usable¶ [*sic*] by individuals with disabilities. Ohio law requires that all entities providing DIPs comply with the ADA. *See* Ohio Admin. Code §3793:4-1-01(R). And Ohio law provides that "[t]he rights of clients for each [DIP] shall include, at a minimum, the following: ... (12) The right not to be discriminated against for receiving services on the basis of ... disability. ... Ohio Admin. Code §3793: 4-1-02(GG)(12). Additionally, Ohio requires each DIP to meet specific handicap accessibility requirements as set forth in §3793:4-1-02(CC) in order to be certified as a DIP, and only certified DIPs may lawfully operate in Ohio, *see* §3793:4-1-01(D). [emphasis added]

Appendix B, p. 6b. Certainly, the appellate court did not mean to suggest that the dilapidated facility where Petitioner was housed really is "accessible" to the disabled, and there is no need for any judicial inquiry, because that's what Ohio law requires.

The allegations that had been raised, which were supposed to be accepted as true by the appellate court, were that Petitioner, Rachel Haas, could not fit

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and must accept all factual allegations as true, *Collins v. Nagle*, 892 F.2d 489, 493 (6th Cir. 1989)." *Final Brief of Appellant State of Ohio, p.5.*

her wheelchair through the narrow doorways. *Appendix G, pp. 55g-57g.* In order to participate in the six (6) day DIP program, she was required to hop up and down several flights of stairs on her one leg several times a day because there was no elevator. *Id.* Unable to carry her wheelchair down the steps to the cafeteria, she had to hop across the floor while carrying her tray of food. *Id.* Because of the lack of handrails, Petitioner had to take showers while seated on the floor and she struggled in and out of bathroom stalls. *Id.* How any court could hold, in a review of a dismissal on the pleadings, that the buildings where Ohio holds DIP programs "are readily accessible to and usable by individuals with disabilities" is absolutely mystifying. *Appendix G, p. 55g.*

CONCLUSION

The Sixth Circuit's Opinion in the proceedings below unjustifiably curtails Congressional authority to protect the rights of the disabled. As properly recognized in the conflicting Opinions of the First, Ninth, and Eleventh Circuits, Title II of the ADA properly abrogates the Eleventh Amendment where important rights sounding in equal protection are at stake. Petitioner's claim that she suffered disparate treatment by being housed in a non-handicap accessible DIP facility falls squarely within the brand of insensitive and unacceptable conduct that the legislature was attempting to eradicate. She should not be denied relief simply because she cannot allege a due process violation and does not fall within one of the protected classes that is entitled to heightened judicial scrutiny. Finally, immunizing the State from its dereliction simply because a judge's order was involved will allow easy circumvention of Title II throughout the penal system and should be forcefully rejected. For these reasons, a Writ of Certiorari should issue with regard to the Sixth Circuit's ill-advised decision.

Respectfully submitted,

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APPENDIX

No. 05-3147

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RACHEL HAAS, ET AL., Plaintiffs-Appellants, v. QUEST RECOVERY SERVICES, INC., ET AL., Defendants-Appellees.	)	FILED NOV 28 2007 LEONARD GREEN, Clerk ORDER

BEFORE: NORRIS and BATCHELDER, Circuit Judges; and COHN, District Judge.*

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

* Hon. Avern Cohn, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

NOT RECOMMENDED FOR FULL TEXT PUBLICATION

No. 05-3147

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RACHEL HAAS, CAROL HAAS, and RICHARD HAAS,

Plaintiffs-Appellants,

v.

QUEST RECOVERY SERVICES, INC. and STATE OF OHIO,

Defendants-Appellees.

FILED

AUG 21 2007

LEONARD GREEN, Clerk

OPINION ON REMAND

BEFORE: NORRIS and BATCHELDER, Circuit Judges; and COHN, District Judge

AVERN COHN, District Judge.*

This is a case under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* Plaintiffs-Appellants Rachel Haas and her parents, Carol Haas and Richard Haas (collectively referred to as the Haases), filed suit against Defendants-Appellees Quest Recovery Services, Inc. (Quest) and

* The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

the State of Ohio,[1] alleging that Rachel Haas suffered discriminatory treatment based upon her physical disabilities while she was participating in a drug and alcohol counseling program administered by Quest and ordered as part of her punishment after she pleaded guilty to operating a vehicle under the influence of alcohol. As will be explained, this is an opinion following remand from the United States Supreme Court. For the reasons that follow, we conclude, in light of *United States v. Georgia*, 546 U.S. 151 (2006), that the Amended Complaint fails to allege any conduct on the part of the State of Ohio which could be construed as a viable claim under Title II.

I.

The Haases appealed the district court's dismissal of their claim against the State of Ohio under Title II. We affirmed. *Haas v. Quest Recovery Servs., Inc.*, 174 Fed. App'x 265 (6th Cir. 2006). We held that (1) the Amended Complaint failed to state a valid claim under Title II against the State of Ohio, and (2) the State of Ohio was immune from suit under the Eleventh Amendment and Congress had not effectively abrogated that immunity. The United States Supreme Court granted the Haases' petition for certiorari, vacated our decision, and remanded the matter for consideration of the views of the United States, particularly the application of *United States v. Georgia*, 546 U.S. 151 (2006). *Haas v. Quest Recovery Servs., Inc.*, 127 S.Ct. 1121 (2007).

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[1] The complaint as originally filed named the City of Canton, Ohio, as a defendant. Plaintiffs, however, dismissed all claims against the City and filed a First Amended Complaint ("Amended Complaint") against only the State of Ohio.

II.

Title II of the ADA provides, in pertinent part:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

In *Georgia*, the Supreme Court held that a court must apply the following three-part test when confronted with an Eleventh Amendment defense to a Title II claim:

> on a claim-by-claim basis (1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment, and (3) insofar as such misconduct violated Title II, but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid.

546 U.S. at 159. Thus, under *Georgia*, the constitutional question – abrogation of Eleventh Amendment immunity – will be reached only after finding a viable claim under Title II. The Haases' Title II claim fails under *Georgia's* first prong because the Amended Complaint does not state a valid claim.

The allegations against the State of Ohio under Title II appear in the Amended Complaint as follows:

> At all times herein relevant, the State is a "public entity" as defined by 42 U.S.C. §12131(1) and was thus subject to ADA Title II.
>
> At the time of Plaintiff's conviction and sentencing, the State was directing certain individuals, through its Municipal Court system, to participate in programs and activities such as that being operated by Quest in lieu of actual incarceration. Such privately operated program and activities offered numerous advantages to the participants over the local jails.
>
> In the manner aforementioned, the Court and/or the State violated ADA Title II by failing to ensure that Plaintiff was able to participate in and benefit from the services, programs, and activities that were being furnished to non-handicapped individuals. The Court and/or State further subjected Plaintiff to discrimination by, for example purposes only, ordering her to be confined in a privately operated system that was not handicap accessible and was being operated by untrained and unqualified staff members.

Amended Complaint at ¶ 36-38.

As an initial matter, the Amended Complaint does not name in its caption any state actor. The only state actor even referenced in the Amended Complaint is the municipal court judge, who, as we initially held, and as the State of Ohio points out, is entitled to

absolute immunity.

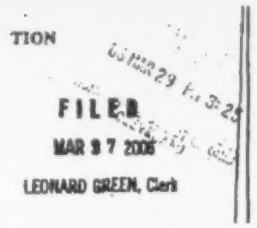
The only allegation in the Amended Complaint which might implicate Title II liability is that the State of Ohio owned the building housing the Quest facility. *See* Amended Complaint at ¶ 14. However, the ADA does not necessarily require a public entity to make its existing physical facilities accessible. *See* 28 C.F.R. §35.150(a)(1). Public entities need only ensure that "each service, program, or activity ... when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. §35.150(a). Only if the building has undergone extensive renovation after the ADA's effective date must the upgrades provide accessibility. *See* 28 C.F.R. §35.350(b)(1). Here, the Haases do not allege that the building was built after the enactment of the ADA or if built earlier, that it was renovated after that date. They allege no facts regarding the State of Ohio's obligations under the ADA with respect to the Quest facility or regarding the Quest facility itself.

Furthermore, public entities need only ensure that "each service, program or activity ... when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a). We agree with the State of Ohio that its driver intervention programs ("DIPs"), when viewed in their entirety, are readily accessible to be usable¶ by individuals with disabilities. Ohio law requires that all entities providing DIPs comply with the ADA. *See* Ohio Admin. Code §3793:4-1-01(R). And Ohio law provides that "[t]he rights of clients for each [DIP] shall include, at a minimum, the following:... (12) The right not to be discriminated against for receiving services on the basis of ... disability ... Ohio Admin.

Code §3792:4-1-01(GG)(12). Additionally, Ohio requires each DIP to meet specific handicapped accessibility requirements set forth in §3793:4-1-02(CC) in order to be certified as a DIP, and only certified DIPs may lawfully operate in Ohio, *see* §3793:4-1-01(D).

Accordingly, we conclude that the Amended Complaint fails to state a claim under Title II of the ADA. In light of this determination, we need not reach the remaining prongs of the *Georgia* analysis.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RACHEL HAAS, CAROL HAAS, and RICHARD HAAS,	)	
Plaintiffs-Appellants,	)	
v.	)	ON APPEAL FROM THE UNTIED STATES
QUEST RECOVERY SERVICES, INC. and STATE OF OHIO,	)	DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO
Defendants-Appellees.	)	OPINION

BEFORE: NORRIS and BATCHELDER, Circuit Judges; and COHN, District Judge*

AVERN COHN, District Judge. This is a case under the Americans with Disabilities Act (ADA), 42 U.S.C. §12101 *et seq.* Plaintiffs-Appellants Rachel Haas and her parents, Carol Haas and Richard Haas (collectively referred to as the Haases), filed suit against Defendants-Appellees Quest Recovery Services, Inc (Quest) and the State of Ohio,[1] alleging that Rachel Haas suffered discriminatory treatment

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* The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

[1] The complaint as originally filed named the City of Canton, Ohio as a defendant. Plaintiffs, however, dismissed all claims against the City and amended the complaint to name the State of Ohio as a party defendant.

based upon her physical disabilities while she was participating in a drug and alcohol counseling program administered by Quest and ordered as part of her punishment after she pleaded guilty to operating a vehicle under the influence of alcohol. The Haases appeal the district court's dismissal of their claim against the State of Ohio under Title II of the ADA, 42 U.S.C. §12132. We affirm.

I. FACTUAL BACKGROUND[2]

On September 19, 2002, Rachel Haas (Haas) was operating an all-terrain vehicle in Louisville, Ohio, while intoxicated. While crossing a road, Haas was hit by a truck and suffered serious injuries, including fractures to her pelvis and arms, a partially severed hand, a crushed leg, and other internal injuries. She was hospitalized for several weeks. During the course of her treatment, her left leg was amputated above the knee, she received a prosthetic right elbow, and a metal rod was placed in her right arm. She was prescribed pain medication and a course of physical therapy upon her release from the hospital.

The local prosecutor charged Haas with driving under the influence of alcohol. OHIO REV. CODE §4511.19(A). She pleaded guilty in the Canton, Ohio, municipal court on February 18, 2003. Prior to her

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[2] Because the district court granted the State of Ohio's motion to dismiss under Fed.R.Civ.P. 12(b)(1) and 12(b)(6), the factual background is taken from the first amended complaint. *Benzon v. Morgan Stanley Distrib., Inc.*, 420 F.3d 598, 609 n.5 (6th Cir. 2005) (noting that this Court accepts as true all of plaintiff's as well-pleaded allegations when we review a grant of a motion to dismiss for failure to state a claim.)

sentencing, she provided the judge with a letter from her physical therapist, stating that rehabilitation would take three to six months and that "[a]ny disruption of this rehabilitation...would be very detrimental to her progress." The municipal court judge sentenced Haas to 36 days of house arrest and required her to participate in two six-day driver intervention programs at Quest's Massillon, Ohio, facility. The State of Ohio owned the building housing Quest's facility and leased it indirectly to Quest.

Haas, who required a wheelchair, reported for her first six-day stay at Quest's facility on March 13, 2003. The first amended complaint describes her experience as follows:

> Plaintiff was instructed by a Quest employee upon her arrival to proceed with her luggage to the sixth floor of the building. When she asked where the elevator was located, she was told there was none and she would need to use the stairs. The Quest employee refused to provide any assistance to her. With her parents' help, Plaintiff was therefore forced to "scoot" herself up six (6) flights of stairs. In addition to substantial physical pain, cramping, and discomfort, Plaintiff also suffered substantial embarrassment and humiliation as numerous other inmates and Quest staff members climbed the stairs past her.
>
> Initially, Quest's staff would only serve her meals in the basement. Plaintiff was thus required to hop, scoot,

> and crawl up and down the steps without any assistance several times a day. Since she could not bring her wheelchair to the basement, she was forced to hop substantial distances in order to get her food and reach the table...
>
> Plaintiff's wheelchair would not fit into the restroom she was required to use, which was not handicap-accessible. Plaintiff had to sit on the floor of the co-ed shower in order to bathe herself...

In addition to this situation, Haas allegedly fell down three flights of stairs while in the facility, displacing the rod in her arm. When her physical therapist wrote another letter indicating that she was not cleared for stair climbing, she was allowed to take meals in her room, though the complaint state that staff "forgot" to deliver food on several occasions.

Despite a favorable assessment by her counselor, the first amended complaint alleges that the facility's direct "advised her that her attitude had been unacceptable and her completion of the program would not be approved." A hearing was conducted in municipal court on April 4, 2003, which resulted in an order of confinement in the Stark County, Ohio, jail for six days beginning April 7, 2003.

II. PROCEDURAL HISTORY

After completing her sentence without further incident, Haas and her parents filed this lawsuit. The complaint as originally filed listed six counts: (1) handicap discrimination, (2) rehabilitation act violations, (3) civil rights violations, (4)

negligence/intentional tort, (5) infliction of emotional distress, and (6) loss of consortium. The Haases abandoned count three (civil rights violation) when they filed the first amended complaint.

The State of Ohio filed a motion to dismiss arguing that Eleventh Amendment immunity barred recovery and, in the alternative, the Haases did not state a valid claim for relief. The district court granted the State's motion in part, ruling that (1) Title II of the ADA dose not abrogate Ohio's Eleventh Amendment immunity to the Haases' ADA claim, (2) Ohio waived its immunity to the Haases' Rehabilitation Act claim, and (3) the Haases failed to state a claim for direct discrimination against the State of Ohio.

On December 28, 2004, the district court entered an order of settlement, followed by another order on January 28, 2005, which provided "[n]otwithstanding the foregoing [settlement and dismissal], this entry shall have no effect upon Plaintiffs' right to appeal the Order of September 20, 2004 dismissing the Americans with Disabilities Act claims ... on the pleadings." Quest settled the ADA and Rehabilitation Act claims against it for an undisclosed sum. The State of Ohio settled a claim under the Rehabilitation Act premised upon its ownership of the building that housed the Quest facility.

III. ANALYSIS

A. Standard of Review

We review *de novo* a district court's grant of a motion to dismiss under Federal Rule of Civil

Procedure 12(b)(6). *Simon v. Pfizer, Inc.*, 398 F.3d 765, 772 (6th Cir. 2005). A motion under Rule 12(b)(6) is granted when "it is clear that the plaintiff can prove no set of facts in support of [the] claim that would entitle [the plaintiff] to relief." *Miller v. Curie*, 50 F.3d 373, 377 (6th Cir. 1995). In deciding a motion under Rule 12(b)(6), the Court accepts all of the allegations as true and construes the complaint "liberally in favor of the party opposing the motion." *Id.* The Court does not accept the "bare assertion of legal conclusions," *Columbia Nat. Res., Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995), nor does the Court accept "unwarranted factual inferences." *Morgan v. Church's Fried Chicken*, 829, F.2d 10, 12 (6th Cir. 1987).

The applicability of the Eleventh Amendment to claims against a state under the ADA is a question of law that we review *de novo*. *Carten v. Kent State Univ.*, 282 F.3d 391, 394 (6th Cir. 2002).

B. Whether the Haases Stated a Claim Under Title II of the ADA

The Haases say that they sufficiently pleaded direct discrimination by the State of Ohio because the Canton, Ohio, municipal court, which is an arm of the Ohio court system, sentenced Rachel to her treatment program and thus caused her to suffer discrimination. Additionally, the Haases premise liability on the State of Ohio's ownership of the building that housed the Quest facility. The State responds that the Haases attempted, but failed, to link any direct action of the State with the actions of Quest, the private facility.

Title II of the ADA provides, in pertinent part:

[N]o qualified individual with a disability

> shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities or a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. §12132.

To state a claim of disability discrimination under Title II of the ADA, a plaintiff must allege that "(1) she has a disability; (2) she is otherwise qualified; and (3) she is being excluded from participating in, being denied the benefits of, or being subjected to discrimination under a program solely because of her disability." *Jones v. city of Monroe*, 341 F.3d 474, 477 (6th Cir. 2003).

The district court found, and the State does not contest, that the Haases satisfied the first and second elements by alleging Rachel Haas was a qualified individual with a disability. On appeal, the Haases argue, as they did before the district court, that liability should be imposed under Title II of the ADA as a result of the Canton, Ohio municipal court's practice of referring disabled individuals to non-handicap accessible drug and alcohol treatment facilities. Alternatively, the Haases argue that the State should be held liable for failing to ensure that the buildings where these activities were being conducted satisfied handicap accessibility requirements.

The district court astutely observed that the Haases are in effect suing the State of Ohio in an attempt to sue the municipal court judge. Indeed, the Haases contend on appeal that the "Canton Municipal

Court treated [Rachel] far more severally [sic] than her non-handicapped counterparts." The proper inquiry for this line of argument is whether the Canton Municipal Court judge is protected by judicial immunity.

The Supreme Court has made clear that judicial immunity is overcome only in two sets of circumstances: "First, a judge is not immune from liability for nonjudicial actions, *i.e.*, actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in complete absence of all jurisdiction." *Mireless v. Waco*, 502 U.S. 9, 11-12 (1991). Issuing an order is judicial in nature. *Bush v. Rauch*, 38 F.3d 842, 847 (6th Cir. 1994). Thus the Canton Municipal Court judge clearly was acting both within his jurisdiction and within his judicial capacity when he issued an order sentencing Haas to two six-day driver intervention programs.

The Haases also argue that "no logical reason exists for cloaking such routine ministerial acts [as ordering a driver intervention program] with absolute judicial immunity." They argue that the order could have been made by a "court administrator, departmental chief, or some other non-judicial state officer or employee." This argument is of no moment, and the district court did not err in finding that the Canton Municipal Court judge has judicial immunity for his sentencing decision.

With respect to the Haases' position that the State of Ohio should be held liable under Title II of the ADA based on its ownership of the building housing the Quest facility, they primarily rely upon *Johnson v. City of Saline*, 151 F.3d 564 (6th Cir. 1998). In

Johnson, this Court held that a public entity that leases or rents its facilities to non-public entities is subject to Title II of the ADA because it is a landlord. *Id.* at 571-72. Here, the district court found that the State of Ohio is subject to liability as a landlord because an agency of the State, the Ohio Department of Alcohol and Drug Addiction Services, leased the property housing the Quest facility to the Stark County Alcohol and Drug Addition Services Board which, in turn, subleased the facility to Quest. Thus, the remaining question is whether Quest is a public entity and whether the State of Ohio is thereby subject to direct liability.

The *Johnson* court enumerated four factors to identify whether a facility appearing to have both public and private features is an arm of the state. Those factors include:

> (1) Whether the entity is operated with public funds;
>
> (2) Whether the entity's employees are considered government employees;
>
> (3) Whether the entity receives significant assistance from the government by provision of property or equipment; and
>
> (4) Whether the entity is governed by an independent board selected by members of a private organization or a board elected by the voters or appointed by elected officials.

Id. at 572.

In their first amended complaint, the Haases alleged the following:

> 16. At all times...Quest acted as an agent and/or extension of the State by performing a *quasi* governmental function under the ultimate supervision, direction, and control of the Court and/or State....
>
> 38. ...The court and/or State further subjected Plaintiff to discrimination by ...ordering her to be confined in a privately operated system [Quest].

The district court correctly found that the Haases did not sufficiently plead that the State of Ohio is responsible for Quest's alleged wrongdoing. The first amended complaint is deficient because it does not satisfy our pleading requirements under *Johnson* for imposing liability on the State of Ohio.

C. Whether the State of Ohio is Entitled to Eleventh Amendment Immunity for the Haases' Claim Under Title II of the ADA

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. AMEND. XI. It is well established that "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (internal citation omitted). "[I]n the absence of consent a suit in which the State or one of

its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." *Id.* Eleventh Amendment immunity does not however, apply in two circumstances: (1) where a state has waived its immunity from suit in federal court, and (2) where Congress has abrogated the state's immunity. *Thiokol Corp. v. Dep't of Treas., State of Mich., Revenue Div.*, 987 F.2d 376, 381 (6th Cir. 1993). The Haases argue that Congress abrogated the State of Ohio's immunity to claims arising under Title II of the ADA.

In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Supreme Court held that Congress can abrogate a State's sovereign immunity when it does so pursuant to a valid exercise of its power under §5 of the Fourteenth Amendment. The most recent Supreme Court case to address Eleventh Amendment Immunity for ADA Title II claims is *Tennessee v. Lane*, 541 U.S. 509 (2004). In *Lane*, the Supreme Court held that Title II of the ADA is a valid exercise of Congress's §5 authority to protect a plaintiff's due process right of access to the courts. *Id.* at 531. The Supreme Court made clear, however, that its holding in *Lane* was expressly limited to the question before it: whether Congress had the power under § 5 of the Fourteenth Amendment to enforce the constitutional right of access to the courts:

> [N]othing in our case law requires us to consider Title II, with its wide variety of applications, as an undifferentiated whole. Whatever might be said about Title II's other applications, the question presented in this case is not whether Congress can validly subject the States to

> private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths...

Id. at 530-31. Accordingly, the holding in *Lane* is limited and does not provide us with guidance for this case because the circumstances presented in *Lane* (*i.e.*, access to the courts) are not present in this case. Thus, we must look to precedent from this circuit to resolve the question before us.

In *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002), a state court failed to provide the plaintiff with adequate hearing assistance during a child custody case. We held, in an *en banc* decision, that the Eleventh Amendment barred claims under Title II of the ADA based upon the Equal Protection Clause but did not bar such claims sounding in due process. *Id.* at 812. The Haases concede on appeal, as they emphasized before the district court, that their claims implicate equal protection concerns, not those of due process: "This Court should now take this opportunity to hold that Title II of the ADA has abrogated Eleventh Amendment immunity even with respect to pure claims of disparate treatment that sound solely in equal protection."

Despite our holding in *Popovich* that the Eleventh Amendment bars equal protection claims under Title II of the ADA, the Haases ask us to clarify our ruling in light of the Supreme Court's decision in *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003). In *Hibbs*, a male state employee sought damages because of alleged violations of the Family Medical Leave Act (FMLA), 29 U.S.C. §2612. *Id.* at

725. The Supreme Court held that Congress intended the FMLA to protect a right guaranteed by the Equal Protection Clause – specifically, the right to be free from gender-based discrimination in the workplace. *Id.* at 728. The Haases say that because the Supreme Court in *Hibbs* determined that Congress validly abrogated Eleventh Amendment immunity based on the principles of equal protection, *Popovich* no longer is persuasive because *Hibbs* suggests that Congress may exercise its §5 authority to adopt legislation imposing purely equal protection-type requirements upon the states. We find this position unavailing, however, because constitutional standards relating to gender-based discrimination (which is what was at issue in *Hibbs*) are distinguishable from those relating to discrimination of the disabled. Notably, gender-based discrimination is entitled to a heightened level of constitutional scrutiny – one that requires a gender-based classification to serve important governmental objectives and be substantially related to the achievement of those objective. *Id.* at 736. Discrimination on the basis of a characteristic such as a disability, on the other hand, is entitled only to a "rational basis" review. *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985). "States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational." *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001).

In light of the narrow scope of *Lane's* holding, which is limited to Title II ADA claims for the right of access to courts, and in light of this circuit's precedent that establishes that the Eleventh Amendment bars

equal protection claims under Title II of the ADA, we find that the district court did not err in holding that the State of Ohio is entitled to Eleventh Amendment immunity for the Haases' claim under Title Ii of the ADA.

IV. CONCLUSION

For the foregoing reasons, the decision of the district court is **AFFIRMED**.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 05-3147

Filed: April 18, 2006

RACHEL HAAS; CAROL HAAS; RICHARD HAAS,)
Plaintiffs-Appellants,

v.

STATE OF OHIO
Defendants-Appellee

MANDATE

Pursuant to the court's disposition that was filed 3/27/06 the mandate for this case hereby issues today.

A True Copy.

COSTS: NONE

Attest:

Filing Fee ..... $
Printing ..... $

Total ..... $

Nancy Baines
Deputy Clerk

City of Canton Ohio. On June 2, 2004, Plaintiffs voluntarily dismissed the City of Canton. Shortly after and on June 11, 2004, Plaintiffs filed an amended complaint. The amended complaint added Ohio as a defendant. In her amended complaint, Plaintiff Rachel Haas generally alleges that Ohio discriminated against her based on alleged physical disabilities by denying access to programs provided to non-disabled individuals.

The amended complaint claims that near September 19, 2002, Rachel Haas suffered various injuries when a truck struck her all terrain vehicle. Following the accident, she underwent extensive medical treatment and physical therapy. The Ohio Highway Patrol cited Rachel Haas for driving under the influence of alcohol at the time of the accident. On February 18, 2003, she pled guilty to the charges against her in Canton Municipal Court. After receiving her guilty plea, Judge Richard Kubilus sentenced Haas to confinement in Quest's drug and alcohol treatment facility in Massillon, Ohio for two six-day periods beginning March 13, 2003 and April 10, 2003.

With their complaint, Plaintiffs say Quest's facility lacked proper accommodations for Rachel Haas' injuries, such as an elevator and disabled-accessible toilets and showers. Plaintiffs allege that Quest personnel were rude and did not approve Rachel Haas' completion of the program.

II. Legal Standard

Ohio moves under Fed. R. Civ. P. 12(b)(1) to dismiss Plaintiffs' claims for lack of subject matter jurisdiction. A Rule 12(b)(1) motion can attack either

the legal or the factual basis for jurisdiction. *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994). In this case, Ohio attacks the legal basis for jurisdiction, saying that it is immune from Plaintiffs' claims under the Eleventh Amendment of the U.S. Constitution. For purposes of deciding this motion, the Court accepts Plaintiffs' allegations as true. *Id.* Although Ohio couches its Eleventh Amendment argument as an alternative basis for dismissal, the Court addresses jurisdictional arguments first.

Ohio separately seeks dismissal under Fed.R.Civ.P.12(b)(6) for failure to sate claim. The Court grants a Rule 12(b)(6) motion when "it is clear that the plaintiff can prove no set of facts in support of [the] claim that would entitle [the plaintiff] to relief." *Miller v. Currie*, 50 F.3d 373, 377 (6th Cir. 1995). In deciding a motion under Rule 12(b)(6), the Court accepts all of the allegations as true and construes the complaint "liberally in favor of the party opposing the motion." *Id.* While the Court accepts all well pleaded allegations as true, the Court does not accept the "bare assertion of legal conclusions." *Columbia Natural Res., Inc. v. Tatum*, 58 F.3d 1101, 1109 (6th Cir. 1995). Nor does the Court accept "unwarranted factual inferences." *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987).

The Court will consider only the well-pleaded factual allegations in the amended complaint itself. *Glicker v. Michigan Liquor Control Comm'n*, 160 F.2d 96, 101 (6th Cir. 1947) ("In considering the motion to dismiss we are controlled by the allegations of the Complaint."). The Court does not "take into account additional facts asserted in a memorandum opposing the motion to dismiss, because such memoranda do not

constitute a pleading under Rule 7(a)." 2 MOORE'S FEDERAL PRACTICE § 12.34[2] (3d ed. 2002).

III. Discussion

Plaintiffs' amended complaint sues Ohio under the following causes of action: (1) disability discrimination in violation of Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12132; and (2) violation of the Rehabilitation Act, 29 U.S.C. §794(a). Ohio argues that this Court should dismiss the claims under Rule 12(b)(6) because Plaintiffs fail to state a claim against Ohio. In the alternative, Ohio argues that the Eleventh Amendment gives it immunity from Plaintiffs' claims.

Title II of the ADA states:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Section 504 of the Rehabilitation Act employs similar language:

> No otherwise qualified individual with a disability in the United States . . . shall, solely, by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C. §794(a). Although the Rehabilitation Act predates the ADA, "analyses of claims made under the two acts run roughly parallel." *Mahon v. Crowell*, 295 F.3d 585, 588-89 (6th Cir. 2002). The primary difference is that the Rehabilitation Act only covers programs or activities that federally-funded entities offer. *McPherson v. Michigan High School Athletics Ass'n*, 119 F.3d 453, 459-60 (6th Cir. 1997). Title II focuses on services, programs, or activities that "public entities" offer, regardless of federal funding.

A. Eleventh Amendment Immunity

Ohio bases its jurisdictional argument on Eleventh Amendment immunity. The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Eleventh Amendment immunity prevents federal courts from exercising jurisdiction over a claim, and bars all suits, whether for injunctive, declaratory or monetary relief, against the state and its departments. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101-01(1984). Eleventh Amendment immunity extends to suits against a state by that state's own citizens. *S.J. v. Hamilton County*, 374 F.3d 416, 419 (6th Cir. 2004).

The Eleventh Amendment does not apply in two situations: (1) If Congress has abrogated the state's immunity, or (2) If the state has waived its immunity from suit in federal court. *Thiokol Corp. v. DOT*, 987 F.2d 376, 381 (6th Cir. 1993). In response to Ohio's motion, Plaintiffs claim that (1) Congress abrogated

Ohio's immunity to claims arising under Title II of the ADA, and (2) Ohio waived its immunity to Rehabilitation Act claims. The Court finds that Ohio has Eleventh Amendment immunity to Plaintiffs' ADA claim, but not to Plaintiffs' Rehabilitation Act claim.

Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001), provides the starting point for the Eleventh Amendment analysis. In *Garrett*, the Supreme Court held that states are immune to suits for money damages under Title I of the ADA.[1] The Court found that Title I improperly abrogated the states' Eleventh Amendment immunity because it exceeded Congress's authority to enforce the Fourteenth Amendment's Due Process Clause. The Court held that only legislation that responds to a "history and pattern of unconstitutional. . .discrimination by the States" is a valid exercise of Congress's enforcement authority. *Id.* at 368. The remedy imposed "must be congruent and proportional to the targeted violation." *Id.* at 374.

Additionally, the Fourteenth Amendment does not require states to accommodate the disabled if the states' actions have a rational basis. *Id.* at 367. The Supreme Court explained that Title I required accommodation despite whether the states have rational bases for disability-based distinctions. *Id.* at 372-74. As a result, Title I did not validly abrogate Eleventh Amendment immunity.

Although *Garrett* did not address Title II, the

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[1] Title I of the ADA generally prohibits employers from "discriminating against a qualified individual with a disability . . . in regard to . . . terms, conditions, and privileges of employment." 42 U.S.C. §12112(a).

Sixth Circuit applied *Garrett*'s reasoning to Eleventh Amendment immunity for Title II claims in *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002). There, the plaintiff alleged that the lack of accommodations for his hearing disability prevented him from participating fully in a child custody hearing. The court concluded that Title II exceeded Congress's enforcement authority under the Equal Protection Clause, but also found that Title II may validly abrogate Eleventh Amendment immunity to enforce due process guarantees. In the court's words, Title II's "participation" requirement "serves to protect [the plaintiff's] due process right to a meaningful hearing . . . . " *Id.* at 815-16.

Tennessee v. Lane, --U.S. --, 124 S. Ct. 1978 (2004), is the most recent Supreme Court decision to address immunity for Title II claims. In *Lane*, the Supreme Court established that Title II is a valid exercise of Congress's Fourteenth Amendment enforcement authority to protect a plaintiff's due process right of access to the courts. *Id.* at 1992. In reaching its decision, the Court noted that Congress developed a legislative record documenting exclusion of the disabled from courthouses and court proceedings. *Id.* at 1990.

The Court further noted that Title II extends beyond the employment discrimination that Title I targets, seeking "to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review." *Id.* at 1988. Those constitutional guarantees include (1) the right of access to the courts, (2) the right of a criminal defendant "to be present at all stages of a trial where his absence might frustrate the fairness of the

proceedings," (3) the right of certain civil litigants to "a meaningful opportunity to be heard," (4) the right of criminal defendants to a trial by jury, and (5) the public's First Amendment right of access to criminal proceedings. *Id.* (citations omitted).

The Supreme Court concluded that Title II was a congruent and proportional response to the documented infringement of access to the courts. *Id.* at 1993-94. The Supreme Court made clear that the decision only addressed the right of access to the courts, and not any other application of Title II: "[N]othing in our case law requires us to consider Title II, with its wide variety of applications, as an undifferentiated whole." *Id.* at 1993.

The Court knows of no cases from the Sixth Circuit or any other circuit that apply *Lane* under the circumstances presented here. The lone case from the Sixth Circuit does not address this issue. *See S.J. v. Hamilton County*, 374 F.3d 416, 421-22 (6th Cir. 2004) (applying *Lane* outside Title II context to help determine whether local government is an arm of the state for purposes of Eleventh Amendment immunity).

Nor do the cases from other circuits provide much guidance on applying *Lane* to these circumstances. *See Badillo-Santiago v. Naveira-Merly*, 378 F.3d 1 (1st Cir. 2004) (vacating dismissal of plaintiff's Title II claim that "during his trial he was denied due process because there was no reasonable accommodation for his hearing impairment"); *Roe v. Johnson*, No.03-CIV-8501, 2004 U.S. Dist. LEXIS 17483, at *14 (S.D. N.Y. Aug. 31, 2004) (granting motion to dismiss Title II claim that state bar association denied plaintiff's application based on

disabilities); *Douris v. Bucks County Office of the DA*, No. 03-CV-5661, 2004 U.S. Dist. LEXIS 12769, at *13 (E.D. Pa. July 6, 2004) (noting that inmate's Title II claim was "problematic," but granting defendants' motion for summary judgment on other grounds); *McNulty v. Board of Educ.*, Civ. No. 2003-2520, 2004 U.S. Dist. LEXIS 12680, at *9 (D. Md. July 8, 2004) (granting motion to dismiss; finding that "Eleventh Amendment immunity remains intact for education claims under Title II of the ADA"); *Solley v. Big Spring State Hosp.*, No. 1:03-CV-094-C,

2004 U.S. Dist. LEXIS 12958, at *13 (N.D. Tex. July 12, 2004) (granting defendant's motion for partial summary judgment; finding that the Eleventh Amendment bars money damages claims for Family and Medical Leave Act violations).

Some cases merit further attention. In *Carrasquillo v. City of New York*, 324 F. Supp. 2d 428, 442 (S.D. N.Y. 2004), the Southern District of New York held that an inmate's Title II claim against the city of New York was actionable under *Lane*. The inmate had difficulty walking because of injuries he sustained in an automobile accident. The inmate alleged that the city violated Title II by placing him "in housing that was far from such prison services as the law library and infirmary, thus forcing Plaintiff to walk great distances to use these facilities and causing him great pain due to his medical condition." *Id.* at 441.

In finding that Eleventh Amendment immunity did not apply, the court interpreted *Lane* as "upholding [the] ADA's abrogation of a State's Eleventh Amendment immunity . . . ." *Id.* at 442. That

interpretation exceeds the scope of the Supreme Court's opinion. *Lane* does not say that the ADA abrogated Eleventh Amendment immunity entirely. Instead, the Supreme Court held only that Title II abrogated Eleventh Amendment immunity for claims implicating the "constitutional right of access to the courts." *Lane*, 124 S. Ct. at 1993. *Carrasquillo* does not persuade this Court.

Nor does the Western District of Wisconsin's decision in *Flakes v. Frank*, 322 F. Supp. 2d 981 (W.D. Wis. 2004). In *Flakes*, the court reconsidered its previous decision denying an inmate's request to proceed with Title II claims against the Secretary of Wisconsin's Department of Corrections. The inmate alleged that the defendant violated Title II by failing to provide various medical services and assistance. *Flakes v. Frank*, No. 04-C189-C, 2004 U.S. Dist. LEXIS 7650, at *11-12 (W.D. Wis. Apr. 30, 2004). The court initially dismissed the inmate's Title II claims based on Seventh Circuit precedent that the ADA did not abrogate Eleventh Amendment immunity with respect to Title I (not Title II) claims. *Flakes*, 322 F. Supp. 2d at 982-83. After *Lane*, the court held that "[a]lthough it may be that in the final analysis, I will conclude that [*Lane*]'s narrow scope does not encompass plaintiff's ADA claims, at this stage of the proceedings I cannot say that plaintiff could prove no set of facts entitling him to relief on his ADA claims." *Id.*

Unlike *Flakes*, this Court relies on both *Lane* and Sixth Circuit precedent that squarely addresses Eleventh Amendment immunity for Title II claims and limits abrogation to Title II claims implicating due process rights. *See Popovich*, 276 F.3d at 811.

Popovich is consistent with *Lane*'s finding that Title II abrogates Eleventh Amendment immunity to the extent that Title II claims are based on the due process right of access to the courts.

Finally, the Court notes the Ninth Circuit's opinion in *Phiffer v. Columbia River Corr. Inst.*, No. 01-35984, 2004 U.S. App. LEXIS 19152 (9th Cir. Sept. 13, 2004). There, the Ninth Circuit found that its pre-*Lane* decision that Title II entirely abrogates Eleventh Amendment immunity was consistent with *Lane*. The Ninth Circuit based its opinion on pre-*Lane* precedent that Title II abrogated immunity if the claims sound in due process *or* equal protection. *Id.* at*2-4. Because the Ninth Circuit applies a different analysis than the Sixth Circuit precedent that guides this Court, *Phiffer* is not instructive.

In light of *Garrett*, *Popovich*, and *Lane*, the Court finds that Ohio has Eleventh Amendment immunity to Plaintiffs' Title II claims. Plaintiffs' ADA claims against Ohio sound in equal protection, not due process. "[A] Title II claim sounds in due process and abrogates sovereign immunity where the plaintiff alleges that he was excluded from participating in a proceeding guaranteed to him by the Due Process Clause on the basis of his disability." *Robinson v. University of Akron Sch. of Law*, 307 F.3d 409, 413 (6th Cir. 2002).

In their brief, Plaintiffs contend that Ohio violated Title II by (1) sending Plaintiff Rachel Haas to a drug and alcohol treatment facility that did not accommodate persons with disabilities, and (2) failing to provide accommodations for the disabled at the allegedly state-owned building that Quest uses. [Doc.

43 at 11-14]. Plaintiffs do not allege that Ohio denied Rachel Haas any due process protections because of her disability. Plaintiffs' claims against Ohio are essentially that Rachel Haas was treated differently from non-disabled individuals: "[S]he did not receive the same favorable alternative to incarceration as her non-handicapped counterparts." [Doc. 43 at 13]. As such, Plaintiffs' claims sound in equal protection, not due process.

The Court notes that *Lane* expressly limited its abrogation of Eleventh Amendment immunity to Title II claims regarding "the constitutional right of access to the courts." 124 S. Ct. at 1993. The Supreme Court identified other fundamental rights violations that could properly fall within the scope of Title II claims. Plaintiffs' claims do not fit those other categories. Plaintiffs' claims against Ohio do not implicate the right of access to the courts, the right to be present at a trial, the right to a meaningful opportunity to be heard, the right to a trial by jury, or the public's right of access to criminal proceedings. *Id.* at 1988. Plaintiffs' claims against Ohio sound in equal protection, not due process. The Court holds that Title II does not abrogate Ohio's Eleventh Amendment immunity to Plaintiffs' ADA claims.

Although courts generally apply the same analysis to claims under the ADA and the Rehabilitation Act, Eleventh Amendment immunity presents an exception. In the Sixth Circuit, it is well-settled that the states waive their Eleventh Amendment immunity to Rehabilitation Act claims by accepting federal funds. *See, e.g., Nihiser v. Ohio EPA*, 269 F.3d 626, 628 (6th Cir. 2001) (citing 42 U.S.C. §2000d-7). Plaintiffs allege that Ohio accepts

federal funds. ¶ 41.[2] Viewing the facts in the light most favorable to Plaintiffs, the Court finds that Ohio waived its immunity to Rehabilitation Act claims.

B. Failure To State A Claim

Plaintiffs contend that Ohio violated the ADA and the Rehabilitation Act by denying Rachel Haas access to and participation in services, programs, and activities that Ohio furnished to non-disabled individuals. Ohio says that based on the amended complaint's allegations, Quest is a private agency and is not under Ohio's control. Although the Court agrees that Plaintiffs fail to state a claim against Ohio under the ADA and the Rehabilitation Act for direct disability discrimination, Plaintiffs' Rehabilitation Act claim regarding Ohio's duties as a property owner survives.

To state a claim of disability discrimination under Title II of the ADA, a plaintiff must allege that "(1) she has a disability; (2)she is otherwise qualified; and (3) she is being excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program solely because of her disability." *Jones v. City of Monroe*, 341 F.3d 474, 477 (6th Cir. 2003). A plaintiff must allege the same elements to state a claim under the Rehabilitation Act. *Mahon*, 295 F.3d at 589. For purposes of Ohio's Rule 12(b)(6) motion, there are no relevant differences between Title II of the ADA and Section 504 of the Rehabilitation Act. A separate analysis of the Rehabilitation Act claim is unnecessary. *See Jones*,

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[2] Paragraph references are to the amended complaint, [Doc. 25].

341 F.3d at 477 n.3.

Plaintiffs satisfy the first and second elements by alleging that Rachel Haas was a qualified individual with a disability. Ohio does not challenge this allegation.

To satisfy the third element, Plaintiffs must sufficiently allege that Ohio's actions caused Rachel Haas to be excluded from participation in, denied the benefits of, or discriminated against under the Quest program because of her disability. Plaintiffs offer two core allegations. [Doc. 43 at 11-14]. First, Ohio committed "direct disability discrimination" when Judge Kubilus ordered Rachel Haas to confinement in a private facility that lacked accommodations for the disabled. Second, Ohio did not meet its obligations as the owner of the property used by Quest. Ohio responds that Plaintiffs have not linked the alleged discrimination by Quest personnel to the state.

Plaintiffs' "direct disability discrimination" claim does not pass muster. Plaintiffs allege that Judge Kubilus understood the extent of Rachel Haas' injuries when he sentenced her to confinement at Quest's facility, and that the Quest program "offered numerous advantages to the participants over the local jails." ¶¶ 12, 13, 37. Plaintiffs do not sufficiently allege that Ohio denied Rachel Haas access to any of the services that Quest offers to program participants. She met with program counselors and participated actively. ¶ 26. Quest's staff delivered food to her room when she had difficulty getting to the dining facility. ¶ 25. Although the staff allegedly forgot to deliver the food "on several occasions," Plaintiffs do not allege that this resulted from discrimination. *Id.*

To the extent Rachel Haas experienced hardships at the Quest facility, Plaintiffs do not allege that those difficulties resulted from discrimination by the state. Although Haas says that Quest's staff "was rude and abusive," Plaintiffs do not allege that Ohio directed Quest's staff to act in such a manner. ¶ 21. Nor do Plaintiffs allege that Ohio directed Quest personnel to impede Rachel Haas' access to physical therapy and pain medication. Although Plaintiffs allege that Ohio owned the building that housed the program, they describe Quest as a "private facility." ¶ 33. None of these allegations imply disability discrimination by Ohio. Plaintiffs have not sufficiently pled that Ohio is responsible for Quest's alleged wrongdoing.[3]

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[3] In *Johnson v. City of Saline*, 151 F.3d 564 (6th Cir. 1998), the Sixth Circuit identified four factors it will consider in the Title II context to determine whether to view a facility as an arm of the state:

> 1) Whether the entity is operated with public funds;
> 2) Whether the entity's employees are considered government employees;
> 3) Whether the entity receives significant assistance from the government by provision of property or equipment; and
> 4) Whether the entity is governed by an independent board selected by members of a private organization or a board elected by the voters or appointed by elected officials.

Id. at 572. At most, Plaintiffs allege that Ohio assisted Quest by providing access to the state-owned building. Plaintiffs offer no allegations regarding the status of Quest's employees, Quest's sources of funding, or the composition of Quest's board of directors.

Even if Plaintiffs sufficiently alleged their "direct disability discrimination" claim against Ohio, they still would have no claim. Plaintiffs contend that the amended complaint "charges an instrumentality of the State with directly violating both the ADA and the Rehabilitation Act." [Doc. 43 at 12] (emphasis in original). Plaintiffs identify Judge Kubilus as the "instrumentality" in question. *Id.* In Plaintiffs' words, "Judge Kubilus was unconcerned with whether Plaintiff was being required to attend a program that was unable to accommodate her readily observable disabilities." *Id.*

Judge Kubilus has judicial immunity for his sentencing decision. "A judge performing his judicial functions is absolutely immune from suit seeking monetary damages." *Johnson v. Turner*, 125 F.3d 324, 333 (6th Cir. 1997). "Immunity is available even if a judge acts erroneously, corruptly, or in excess of his jurisdiction." *Id.* Plaintiffs' dissatisfaction with Judge Kubilus's decision does not provide a cause of action against Ohio. *See Saint-Fleur v. City of New York*, No. 99-CIV-10433, 2000 U.S. Dist. LEXIS 8814, at *18 (S.D. N.Y. Mar. 14, 2000) ("To the extent that [the plaintiffs] claim against the State is, in reality, an attempt to sue state court judges for damages, his claims are barred."). Plaintiffs fail to state a claim against Ohio for direct disability discrimination under the ADA and the Rehabilitation Act.

Plaintiffs fare better on their claim regarding Ohio's obligations as the owner of the property. Plaintiffs allege that Ohio owns the Quest facility. ¶ 14. In *Johnson v. City of Saline*, 151 F.3d 564, 571 (6th Cir. 1998), the Sixth Circuit addressed the obligations of property owners under Title II and the

Rehabilitation Act and held that "public entities have a duty to provide accessible facilities even when those facilities are used by contractors." As in *Johnson*, "[Ohio] definitely is a landlord, required by Title II to reasonably accommodate the disabled public." *Id.* at 572.

At this stage, the Court cannot rule as a matter of law that Ohio met its obligations as owner of the property. The Court notes that the accessibility requirements are "subject to the bounds of reasonableness." *Id.* at 571. After the completion of discovery, Ohio may very well come forward with evidence that it has taken reasonable steps to provide disabled access to the facility, or that "making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. §35.130(b)(7). Because Ohio has Eleventh Amendment immunity to Plaintiffs' ADA claims, only the Rehabilitation Act claim on this issue survives.

C. Leave To Amend

Plaintiffs request leave to file another amended complaint. Plaintiffs have already filed two complaints in this action. The dispositive discovery deadline is September 23, 2004. The dispositive motion deadline is September 30, 2004. Under these circumstances, the Court finds that Plaintiffs' request is untimely and would impose undue hardship on the other parties. *See Head v. Jellico Housing Auth.*, 870 F.2d 1117, 1124 (6th Cir. 1989). Additionally, amendment would not cure the legal flaws of the dismissed claims.

IV. Conclusion

For these reasons, this Court dismisses Plaintiffs' ADA claims against Defendant Ohio in their entirety under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). The Court also dismisses Plaintiffs' Rehabilitation Act claim against Ohio for direct disability discrimination under Rule 12(b)(6). Plaintiffs' Rehabilitation Act claim against Ohio for failure to comply with disabled accessibility requirements may proceed. The Court denies Plaintiffs' request for leave to amend.

IT IS SO ORDERED.

Dated: September 20, 2004

s/ James S. Gwin
JAMES S. GWIN
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

RACHEL HAAS 8344 Chapel Street Waynesburg, Ohio 44688 and	CASE NO. JUDGE COMPLAINT
CAROL HAAS 8344 Chapel Street Waynesburg, Ohio 44688 and	[JURY DEMAND ENDORSED HEREON]
RICHARD HAAS 8344 Chapel Street Waynesburg, Ohio 44688	DIVISION CASE NO. 5:04CV0409
Plaintiffs, vs.	
QUEST RECOVERY SERVICES, INC. 1341 Market Ave., North Canton, Ohio 44714-2675 and	
CITY OF CANTON c/o Department of Law City Hall – 7th Floor 218 Cleveland Ave., S.W. Canton, Ohio 44701	
Defendants.	

COMPLAINT

Plaintiffs, Rachel Haas, Carol Haas, and Richard Haas, hereby state as their Complaint against Defendants, Quest Recovery Services, Inc. (hereinafter "Quest") and the City of Canton (hereinafter the "City"), as follows:

PARTIES

1. At all times herein relevant, Plaintiffs were and are residents of Stark County, Ohio.

2. At all times herein relevant, Quest was and is a corporation formed under Ohio law. *Charter No. RN203064.* Quest has maintained a presence and provided services in Stark County and elsewhere in the State of Ohio.

3. At all times herein relevant, the City was and is a political subdivision organized under Ohio law and capable of suing and being sued.

JURISDICTION AND VENUE

4. Jurisdiction over the controversy described herein properly lies in this Court as several of Plaintiffs' claims arise under the laws of the United States. *28 U.S.C. §1331* (Federal Question). Additionally, Plaintiffs are seeking relief for the violation of their federal civil rights. *28 U.S.C. §1343* (Civil Rights and Elective Franchise).

5. Venue is appropriate in this Court as the parties reside and a substantial part of the events and circumstances giving rise to Plaintiffs' claims occurred within this judicial district. *28 U.S.C. §1391* (Venue Generally).

BACKGROUND

6. On or about September 19, 2002, Plaintiff, Rachel Haas, was operating a 4-wheel all terrain vehicle in Louisville, Ohio. She was twenty-four (24) years old at the time.

7. As she was crossing Meese Road, Plaintiff was struck by a truck and thrown from her vehicle. Plaintiff sustained life-threatening injuries in the collision, including multiple fractures to her pelvis, compound fractures in both arms, a partially severed left hand, a crushed left leg, broken teeth, and substantial internal damage.

8. Plaintiff was transported to Aultman Hospital and underwent emergency surgery. Over the course of the next several weeks, her physicians performed numerous procedures including the amputation of her left leg above the knee and reattachment of her left hand. Various types of hardware were also implanted in Plaintiff, such as a prosthetic right elbow and a metal rod in her right arm.

9. Plaintiff was confined to Aultman Hospital for approximately four (4) weeks. Once she was released, she was prescribed narcotics to relieve her pain and numerous other medications. She then began a rigorous full-time course of physical therapy and rehabilitation.

10. Plaintiff was charged by the Ohio State Highway Patrol with driving under the influence of alcohol in connection with her accident. *O.R.C. §4511.19(A)(1) & (2).* The case was assigned to Judge Richard Joseph Kubilus of the City's Municipal Court.

Case No. 2002 TRC 10088.

11. On February 18, 2003, Plaintiff entered a plea of guilty to the charge against her. Plaintiff was then sentenced accordingly by Judge Kubilus.

12. In a further order issued on February 26, 2003, Judge Kubilus directed that Plaintiff was to be confined for two (2) six-day periods at Quest's facility in Massillon, Ohio. Notwithstanding her physical impairments, she was directed to begin the first session on March 13, 2003.

13. At all times thereafter, Quest acted as an agent and/or extension of the City by performing a *quasi*-municipal function under the City's ultimate supervision, direction, and control.

14. Plaintiff reported to the Quest facility on March 13, 2003 as directed. At that stage in her recovery she was still confined to a wheelchair and had trouble performing many basic functions such as standing, walking, using the bathroom, or lifting or manipulating objects. Plaintiff was still taking narcotic pain pills and other medications, as prescribed by her physicians.

15. Plaintiff was instructed by a Quest employee upon her arrival to proceed with her luggage to the sixth floor of the building. When she asked where the elevator was located, she was told there was none and she would need to use the stairs. The Quest employee refused to provide any assistance to her. With her parents' help, Plaintiff was therefore forced to "scoot" herself up six (6) flights of stairs. In addition to substantial physical pain, cramping, and discomfort, Plaintiff also suffered substantial embarrassment and

humiliation as numerous other inmates and Quest staff members climbed the stairs past her.

16. Initially, Quest's staff would only serve her meals in the basement. Plaintiff was thus required to hop, scoot, and crawl up and down the steps without any assistance several times a day. Since she could not bring her wheelchair to the basement, she was forced to hop substantial distances in order to get her food and reach the table. These journeys were extremely painful and embarrassing for Plaintiff.

17. Plaintiff's wheelchair would not fit into the restroom she was required to use, which was not handicap-accessible. Plaintiff had to sit on the floor of the co-ed shower in order to bathe herself. Plaintiff also experienced substantial difficulty utilizing the non-handicap accessible toilets, which was greatly complicated by her internal injuries and the medications she was taking.

18. Quest's staff refused to offer any special assistance to her and was rude and abusive. They frequently subjected Plaintiff to disparate treatment. For example, Quest's staff berated her about the oxycotin medication that had been prescribed to her and insinuated on several occasions that she was a drug addict. They subjected her to humiliating monitoring when she took the pills. On many occasions, Quest employees resisted providing her with the medication she required.

19. Plaintiff's understanding had been that arrangements had been made with Judge Kubulis to permit her to attend her daily physical therapy treatments during her confinement. On the second

day, Quest's staff refused to allow her to leave for her appointment. Plaintiff immediately became alarmed and upset that her recovery from the accident would be impaired. She had been warned by her health care providers that she could lose her right arm if she did not adhere to her physical therapy regime. It was not until the next day that Quest finally acquiesced to allowing Plaintiff to leave the premises for her treatments.

20. On or about March 16, 2003, Plaintiff slipped and fell as she was hopping up the steps at Quest's facility. She tumbled down three (3) stairs, displacing the rod in her right arm in the process. Plaintiff suffered unbearable pain as a result of the fall and again became fearful that her recovery was in jeopardy.

21. The next day, Plaintiff's physical therapist, Rich Guscatitas, P.T., issued a letter confirming that she had not been cleared to climb six (6) flights of steps three (3) times a day. *See Exhibit A, appended hereto.* The therapist further expressed concern that the facility was not handicap accessible. *Id.* He concluded that:

> Once again, the situation does not sound like a disability accessible site and needs to be reconsidered at this time for the patient's best interests and safety.

Id.

22. Plaintiff's treatment by Quest's staff thereafter only became worse. She was advised that she would no longer be required to use the steps and her meals would be brought to her in her room. They

thereafter "forgot" to deliver the food to her on several occasions leaving her without anything to eat.

23. On Plaintiff's fifth day in the facility, she met with the counselor who had been working the most with her. After conducting his assessment, he concluded that Plaintiff had been active and cooperative, had successfully completed the program, and did not need any further alcohol/substance abuse treatment.

24. Shortly thereafter, Plaintiff was directed to report to the Director of the Quest facility. The Director proceeded to tear up the favorable assessment form that had been prepared by the counselor. She then advised Plaintiff that her attitude had been unacceptable and her completion of the program would not be approved. Plaintiff was emotionally devastated as a result.

25. On March 27, 2003, Judge Kubulis issued an order threatening to impose additional sanctions against Plaintiff for failing to complete the Quest program. Quest's Director and at least one (1) staff member appeared for the hearing that was conducted on April 4, 2003 in the City's Municipal Court. At the conclusion of this proceeding, Judge Kubilus ordered Plaintiff to be imprisoned in the Stark County Jail for six (6) days. Although her physical impairments had worsened as a result of her mistreatment by Quest, Plaintiff was ordered to begin her confinement on April 7, 2003.

26. Plaintiff completed her six (6) day incarceration in the Stark County Jail without incident.

27. As a direct and proximate result of the abuse and mistreatment that was inflicted upon her between March 13, 2003 and April 4, 2003, Plaintiff has suffered serious emotional harm and her physical recovery from her accident has been substantially impaired.

COUNT I
HANDICAP DISCRIMINATION

28. Plaintiffs hereby repeat and reallege the foregoing allegations of this pleading as if fully restated herein.

29. Following her accident of September 19, 2002, Plaintiff, Rachel Haas, suffered from a number of physical "disabilities" that substantially limited many of her major life activities within the meaning of *42 U.S.C. §12102(2).* These physical impairments included, but were not limited to, the loss of her left leg below the knee, substantial impairment of both arms and hands, and considerable damage to her pelvis and internal organs.

30. At all times herein relevant, Quest qualified as a "private entity" pursuant to *42 U.S.C. §12181(6)* and was thus subject to Title III of the Americans with Disabilities Act (ADA).

31. At all times herein relevant, the Massillon facility operated by Quest qualified as a place of "public accommodation" within the meaning of *42 U.S.C. §12181(7)* and was thus subject to ADA Title III.

32. In the manner aforementioned, Quest violated ADA Title III by discriminating against Plaintiff on the basis of her disabilities and effectively

depriving her of the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of the Massillon facility. *42 U.S.C. §12182(a).* Quest's disparate treatment of Plaintiff included (but was not limited to) failing to accommodate her physical handicaps by making the building and structures readily accessible to her or providing her with the assistance she required to complete the program. Unlike the other inmates at the facility, Plaintiff was abused and mistreated by Quest's staff as a result of her inability to comply with their unreasonable expectations.

33. At all times herein relevant, the City was a "public entity" as defined by *42 U.S.C. §12131(1)* and was thus subject to ADA Title II.

34. At the time of Plaintiff's conviction and sentencing, the City was directing certain individuals, through its Municipal Court system, to participate in programs and activities such as that being operated by Quest in lieu of actual incarceration. Such privately operated programs and activities offered numerous advantages to the participants over the local jails.

35. In the manner aforementioned, the City violated ADA Title II by failing to ensure that Plaintiff was able to participate in and benefit from the services, programs, and activities that were being furnished to non-handicapped individuals. The City further subjected Plaintiff to discrimination by, for example purposes only, ordering her to be confined in a privately operated system that was not handicap accessible and was being operated by untrained and unqualified staff members.

36. In accordance with *42 U.S.C. §12133* and

29 U.S.C. §794, Plaintiff is entitled to compensation from Defendants to the fullest extent permitted by law for the damages and losses she has suffered, and will continue to suffer, as described herein as well as appropriate injunctive relief. As permitted by *42 U.S.C. §12188* and *42 U.S.C. §2000a-3(a)*, appropriate injunction relief should further be imposed against Quest to preclude all further violations of ADA Title III.

COUNT II
REHABILITATION ACT

37. Plaintiffs hereby repeat and reallege the foregoing allegations of this pleading as if fully restated herein.

38. Plaintiff reasonably believes, and therefore alleges, that the programs and activities provided by Quest and/or the City as described herein received federal financial assistance, directly or indirectly, and thus were subject to the Rehabilitation Act. *29 U.S.C. §794(a).*

39. As a consequence of the substantial physical impairments she was suffering that precluded her from performing many usual life activities, Plaintiff was a "qualified individual with a disability" within the meaning of *29 U.S.C. §794(a)* throughout her dealings and interactions with Defendants.

40. In the manner aforementioned, Defendants discriminated against Plaintiff by denying her the full access to, participation in, and the benefits of the programs and activities that were being provided to non-handicapped individuals. *29 U.S.C. §794(a).* This disparate treatment was imposed upon

Plaintiff because of her disabilities.

41. Plaintiff's handicaps were readily apparent to everyone observing her. Her physical inability to perform most typical life functions was thus known to the employees and agents of Defendants. They nevertheless imposed unreasonable burdens upon her and refused to supply her with the readily available accommodations she required.

42. In the manner aforementioned, the employees and agents of Defendants acted intentionally with respect to their mistreatment of Plaintiff and displayed a deliberate indifference to her needs and legal rights as a handicapped individual.

43. Plaintiff is entitled to full compensation for the damages and losses she has suffered, and will continue to suffer, as a direct and proximate result of the violations of *29 U.S.C. §794(a)* by Defendants.

COUNT III
CIVIL RIGHTS VIOLATIONS

44. Plaintiffs hereby repeat and reallege the foregoing allegations of this pleading as if fully restated herein.

45. At all times herein relevant, Plaintiff was a citizen of the United States and thus entitled to the full benefits and equal protection of the federal constitutional and all laws and regulations enacted thereunder.

46. In the manner aforementioned, Defendants and their officials, employees, agents, and representatives were acting at all times under the color of the statutes, ordinances, regulations, customs, and usage of the State of Ohio, County of Stark, and

City of Canton. Quest, in particular, served as an instrumentality of the City in providing what was essentially a municipal service at the City's request and under the City's ultimate control.

47. In the manner aforementioned, Defendants knowingly and purposefully deprived Plaintiff of her clearly established rights, privileges, and immunities as secured by the Constitution and laws of the United States in violation of *42 U.S.C. §1983*. These clearly established rights included, but were not limited to, those afforded under the Eighth Amendment (Cruel and Unusual Punishment) and Fourteenth Amendment (Due Process and Equal Protection). As alleged in Count I and II of this Complaint, Plaintiff was further denied her rights under the federal ADA and Rehabilitation Act.

48. Defendants' officials, employees, agents, and representatives knew, or should have known, that their acts and omissions as herein described were prohibited under federal law.

49. At all times herein relevant, Plaintiff was treated in accordance with the procedures, practices, and policies that had been established and approved by the City's duly authorized officials and policymakers.

50. As a direct and proximate result of Defendants' interference with Plaintiff's federal constitutional and statutory rights, she has suffered substantial damages and losses, which are expected to be ongoing.

COUNT IV
NEGLIGENCE/INTENTIONAL TORT

51. Plaintiffs hereby repeat and reallege the foregoing allegations of this pleading as if fully restated herein.

52. At all times herein relevant, Defendants were subject to a common law duty that required them to afford due care to Plaintiff and make reasonable accommodations for her safety.

53. Because Plaintiff's presence on Quest's property conferred direct and/or indirect benefits upon the owner and/or occupier of the premises, she qualified as a "business invitee" and was entitled to a heightened duty of protection.

54. Defendants' legal responsibilities to Plaintiff were further established in various laws and regulations applicable to them, including those pertaining to accommodations for the handicapped and other safety standards.

55. Through no fault of Plaintiff, Defendants carelessly and unjustifiably failed to abide by the aforementioned duties that were owed to her. Defendants' negligence and negligence *per se* included, but was not limited to, failing to:

a. provide handicap-accessible facilities;
b. furnish a safe means of travel between floors;
c. hire and properly train staff members to accommodate handicapped individuals;
d. remove hazards posed to handicapped individuals;

e. warn Plaintiff of dangers posed to her; and

f. establish effective procedures to allow residents to receive the medical care, rehabilitation services, and medicine they required.

56. In the manner aforementioned, Defendants' negligence and negligence *per se* was committed in connection with physical defects existing within grounds and/or buildings that were used in connection with the performance of proprietary and/or governmental functions within the meaning of *O.R.C. §2744.02(B)(4).*

57. Defendants knew, or in the exercise of due care should have known, that they were jeopardizing Plaintiff's health and safety by failing to abide by the aforementioned duties, standards and regulations. Defendants thus acted with a deliberate indifference to Plaintiff's rights and safety and in a manner that posed a great risk of harm to her.

58. As a direct and proximate result of Defendants' negligent, reckless, and/or malicious wrongdoing as aforementioned, Plaintiff has sustained severe physical injuries, required substantial medical treatment, suffered an impairment of her earning capacity, endured great pain, anxiety, and distress, and has been prevented from performing many usual activities. Plaintiff reasonably believes, and therefore alleges, that these losses will be ongoing.

COUNT V
INFLICTION OF EMOTIONAL DISTRESS

59. Plaintiffs hereby repeat and reallege the

foregoing allegations of this pleading as if fully restated herein.

60. In the manner aforementioned, Quest's employees, agents, and representatives acted in an extreme and outrageous manner which they knew, or reasonably should have known, would cause Plaintiff to suffer extreme embarrassment, distress, and anxiety. They nevertheless took such actions with a conscience disregard of Plaintiff's rights and safety.

61. The stress, anxiety, and embarrassment that were inflicted upon Plaintiff went well beyond the bounds of human decency and were more than any reasonable person with her physical disabilities could be expected to endure.

62. As a direct and proximate result of the intentional acts and omission of Quest's employees, agents, and representatives as aforementioned, Plaintiff has endured severe and debilitating emotional harm. Plaintiff reasonably believes, and therefore alleges, that her suffering in this regard will be ongoing.

COUNT VI
LOSS OF CONSORTIUM

63. Plaintiffs hereby repeat and reallege the foregoing allegations of this pleading as if fully restated herein.

64. Plaintiffs, Carol and Richard Haas, are the natural parents of Plaintiff, Rachel Haas.

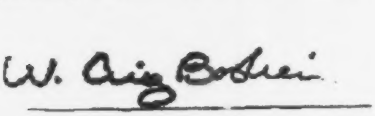
65. As a direct and proximate result of the acts and omissions of Defendants as herein described, Plaintiffs, Carol and Richard Haas, have been denied the companionship, support, and consortium of their

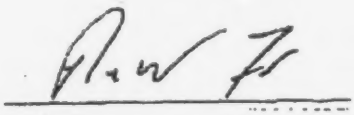
daughter. Plaintiffs have further been required to devote considerable time and effort to assist her with her recovery from the damages and losses herein described. Plaintiffs reasonably believe, and therefore allege, that these losses will be ongoing.

PRAYER

WHEREFORE, Plaintiffs demand judgment against Defendants, jointly and severally, for compensatory damages of ONE MILLION DOLLARS ($1,000,000.00). Plaintiffs further request that punitive damages be imposed against Defendant, Quest Recovery Services, Inc., in the amount of FIVE MILLION DOLLARS ($5,000,000.00). Additionally, this Court should assess Defendants, jointly and severally, with reasonable attorney fees and litigation expenses, pre-judgment interest, costs of this action, and any other legal, equitable, or declaratory relief deemed appropriate. Trial by jury is hereby requested upon all issues.

Respectfully Submitted.





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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

RACHEL HAAS, *et al.*	CASE NO. 5:04cv00409
Plaintiffs,	JUDGE JAMES S. GWIN
vs.	FIRST AMENDED COMPLAINT
QUEST RECOVERY SERVICES, INC.	[JURY DEMAND ENDORSED HEREON]
Defendant.	
and	
STATE OF OHIO c/o James Petro, Attorney General 30 E. Broad St., 17th Floor Columbus, Ohio 43215-3428	
New Party Defendants.	

FIRST AMENDED COMPLAINT

Plaintiffs, Rachel Haas, Carol Haas, and Richard Haas, hereby state as their First Amended Complaint against Defendant, Quest Recovery Services, Inc. (hereinafter "Quest") and New Party Defendants, and the State of Ohio (hereinafter the "State"), as follows:

PARTIES

1. At all times herein relevant, Plaintiffs were and are residents of Stark County, Ohio.

2. At all times herein relevant, Quest was and is a corporation formed under Ohio law. *Charter No. RN203064.* Quest has maintained a presence and provided services in Stark County and elsewhere in the State of Ohio.

3. At all times herein relevant, the State was and is a governmental entity capable of suing and being sued. The State established, funds, and maintains the Canton Municipal Court, whish is an instrumentality thereof.

JURISDICTION AND VENUE

4. Jurisdiction over the controversy described herein properly lies in this Court as several of Plaintiffs' claims arise under the laws of the United States. *28 U.S.C. §1331* (Federal Question). Additionally, Plaintiffs are seeking relief for the violation of their federal civil rights. *28 U.S.C. §1343* (Civil Rights and Elective Franchise).

5. Venue is appropriate in this Court as the parties reside and a substantial part of the events and circumstances giving rise to Plaintiffs' claims occurred within this judicial district. *28 U.S.C. §1391* (Venue Generally).

BACKGROUND

6. On or about September 19, 2002, Plaintiff, Rachel Haas, was operating a 4-wheel all terrain vehicle in Louisville, Ohio. She was twenty-four (24) years old at the time.

7. As she was crossing Meese Road, Plaintiff was struck by a truck and thrown from her vehicle. Plaintiff sustained life-threatening injuries in the collision, including multiple fractures to her pelvis, compound fractures in both arms, a partially severed left hand, a crushed left leg, broken teeth, and substantial internal damage.

8. Plaintiff was transported to Aultman Hospital and underwent emergency surgery. Over the course of the next several weeks, her physicians performed numerous procedures including the amputation of her left leg above the knee and reattachment of her left hand. Various types of hardware were also implanted in Plaintiff, such as a prosthetic right elbow and a metal rod in her right arm.

9. Plaintiff was confined to Aultman Hospital for approximately four (4) weeks. Once she was released, she was prescribed narcotics to relieve her pain and numerous other medications. She then began a rigorous full-time course of physical therapy and rehabilitation.

10. Plaintiff was charged by the Ohio State Highway Patrol with driving under the influence of alcohol in connection with her accident. *O.R.C. §4511.19(A)(1) & (2).* The case was assigned to Judge Richard Joseph Kubilus of the Canton Municipal Court. *Case No. 2002 TRC 10088.*

11. On February 18, 2003, Plaintiff entered a plea of guilty to the charge against her.

12. Prior to sentencing, the Court had been provided with a letter from Plaintiff's physical

therapist, Rick Gustaitis, dated January 27, 2003, a true and exact copy of which is appended hereto as *Exhibit A.* Therein, he described the nature of Plaintiff's injuries and opined that she would need 3-6 months of continued physical therapy, any disruption of which "would be very detrimental to her progress."

13. In an entry issued on or about February 18, 2003, Judge Kubilus directed that Plaintiff was to be confined for ten (10) days at Quest's facility in Massillon, Ohio (hereinafter the "facility"). Notwithstanding her physical impairments, she was ordered to enter the program by February 28, 2003. *See Exhibit B, appended hereto.*

14. Plaintiff reasonably believes, and therefore alleges, that Quest's facility was constructed, owned, and/or maintained by the State.

15. In a further order issued on February 26, 2003, Plaintiff's sentence was increased to two (2) 6-day periods of confinement which were to commence, respectively, on March 13, 2003 and April 10, 2003.

16. At all times thereafter, Quest acted as an agent and/or extension of the State by performing a *quasi*-governmental function under the ultimate supervision, direction, and control of the Court and/or State.

17. Plaintiff reported to the Quest facility on March 13, 2003 as directed. At that stage in her recovery she was still confined to a wheelchair and had trouble performing many basic functions such as standing, walking, using the bathroom, or lifting or manipulating objects. Plaintiff was still taking narcotic pain pills and other medications, as

prescribed by her physicians.

18. Plaintiff was instructed by a Quest employee upon her arrival to proceed with her luggage to the sixth floor of the building. When she asked where the elevator was located, she was told there was none and she would need to use the stairs. The Quest employee refused to provide any assistance to her. With her parents' help, Plaintiff was therefore forced to "scoot" herself up six (6) flights of stairs. In addition to substantial physical pain, cramping, and discomfort, Plaintiff also suffered substantial embarrassment and humiliation as numerous other inmates and Quest staff members climbed the stairs past her.

19. Initially, Quest's staff would only serve her meals in the basement. Plaintiff was thus required to hop, scoot, and crawl up and down the steps without any assistance several times a day. Since she could not bring her wheelchair to the basement, she was forced to hop substantial distances in order to get her food and reach the table. These journeys were extremely painful and embarrassing for Plaintiff.

20. Plaintiff's wheelchair would not fit into the restroom she was required to use, which was not handicap-accessible. Plaintiff had to sit on the floor of the co-ed shower in order to bathe herself. Plaintiff also experienced substantial difficulty utilizing the non-handicap accessible toilets, which was greatly complicated by her internal injuries and the medications she was taking.

21. Quest's staff refused to offer any special assistance to her and was rude and abusive. They frequently subjected Plaintiff to disparate treatment.

For example, Quest's staff berated her about the oxycotin medication that had been prescribed to her and insinuated on several occasions that she was a drug addict. They subjected her to humiliating monitoring when she took the pills. On many occasions, Quest employees resisted providing her with the medication she required.

22. Plaintiff's understanding had been that arrangements had been made with Judge Kubulis to permit her to attend her daily physical therapy treatments during her confinement. On the second day, Quest's staff refused to allow her to leave for her appointment. Plaintiff immediately became alarmed and upset that her recovery from the accident would be impaired. She had been warned by her health care providers that she could lose her right arm if she did not adhere to her physical therapy regime. It was not until the next day that Quest finally acquiesced to allowing Plaintiff to leave the premises for her treatments.

23. On or about March 16, 2003, Plaintiff slipped and fell as she was hopping up the steps at Quest's facility. She tumbled down three (3) stairs, displacing the rod in her right arm in the process. Plaintiff suffered unbearable pain as a result of the fall and again became fearful that her recovery was in jeopardy.

24. The next day, Plaintiff's physical therapist, Rich Guscatitas, P.T., issued a letter confirming that she had not been cleared ~~to~~ climb six (6) flights of steps three (3) times a day. *See Exhibit C, appended hereto.* The therapist further expressed concern that the facility was not handicap accessible.

Id. He concluded that:

> Once again, the situation does not sound like a disability accessible site and needs to be reconsidered at this time for the patient's best interests and safety.

Id.

25. Plaintiff's treatment by Quest's staff thereafter only became worse. She was advised that she would no longer be required to use the steps and her meals would be brought to her in her room. They thereafter "forgot" to deliver the food to her on several occasions leaving her without anything to eat.

26. On Plaintiff's fifth day in the facility, she met with the counselor who had been working the most with her. After conducting his assessment, he concluded that Plaintiff had been active and cooperative, had successfully completed the program, and did not need any further alcohol/substance abuse treatment.

27. Shortly thereafter, Plaintiff was directed to report to the Director of the Quest facility. The Director proceeded to tear up the favorable assessment form that had been prepared by the counselor. She then advised Plaintiff that her attitude had been unacceptable and her completion of the program would not be approved. Plaintiff was emotionally devastated as a result.

28. On March 27, 2003, Judge Kubulis issued an order threatening to impose additional sanctions against Plaintiff for failing to complete the Quest program. Quest's Director and at least one (1) staff member appeared for the hearing that was conducted

on April 4, 2003 in the Canton Municipal Court. At the conclusion of this proceeding, Judge Kubilus ordered Plaintiff to be imprisoned in the Stark County Jail for six (6) days. Although her physical impairments had worsened as a result of her mistreatment by Quest, Plaintiff was ordered to begin her confinement on April 7, 2003.

29. Plaintiff completed her six (6) day incarceration in the Stark County Jail without incident.

30. As a direct and proximate result of the abuse and mistreatment that was inflicted upon her between March 13, 2003 and April 4, 2003, Plaintiff has suffered serious emotional harm and her physical recovery from her accident has been substantially impaired.

COUNT I
HANDICAP DISCRIMINATION

31. Plaintiffs hereby repeat and reallege the foregoing allegations of this pleading as if fully restated herein.

32. Following her accident of September 19, 2002, Plaintiff, Rachel Haas, suffered from a number of physical "disabilities" that substantially limited many of her major life activities within the meaning of *42 U.S.C. §12102(2).* These physical impairments included, but were not limited to, the loss of her left leg below the knee, substantial impairment of both arms and hands, and considerable damage to her pelvis and internal organs.

33. At all times herein relevant, Quest qualified as a "private entity" pursuant to *42 U.S.C.*

§12181(6) and was thus subject to Title III of the Americans with Disabilities Act (ADA).

34. At all times herein relevant, the Massillon facility operated by Quest qualified as a place of "public accommodation" within the meaning of *42 U.S.C. §12181(7)* and was thus subject to ADA Title III.

35. In the manner aforementioned, Quest violated ADA Title III by discriminating against Plaintiff on the basis of her disabilities and effectively depriving her of the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of the Massillon facility. *42 U.S.C. §12182(a).* Quest's disparate treatment of Plaintiff included (but was not limited to) failing to accommodate her physical handicaps by making the building and structures readily accessible to her or providing her with the assistance she required to complete the program. Unlike the other inmates at the facility, Plaintiff was abused and mistreated by Quest's staff as a result of her inability to comply with their unreasonable expectations.

36. At all times herein relevant, the State is a "public entity" as defined by *42 U.S.C. §12131(1)* and was thus subject to ADA Title II.

37. At the time of Plaintiff's conviction and sentencing, the State was directing certain individuals, through its Municipal Court system, to participate in programs and activities such as that being operated by Quest in lieu of actual incarceration. Such privately operated programs and activities offered numerous advantages to the participants over the local jails.

38. In the manner aforementioned, the Court and/or State violated ADA Title II by failing to ensure that Plaintiff was able to participate in and benefit from the services, programs, and activities that were being furnished to non-handicapped individuals. The Court and/or State further subjected Plaintiff to discrimination by, for example purposes only, ordering her to be confined in a privately operated system that was not handicap accessible and was being operated by untrained and unqualified staff members.

39. In accordance with *42 U.S.C. §12133* and *29 U.S.C. §794*, Plaintiff is entitled to compensation from Defendants to the fullest extent permitted by law for the damages and losses she has suffered, and will continue to suffer, as described herein as well as appropriate injunctive relief. As permitted by *42 U.S.C. §12188* and *42 U.S.C. §2000a-3(a)*, appropriate injunction relief should further be imposed against Quest to preclude all further violations of ADA Title III.

COUNT II
REHABILITATION ACT

40. Plaintiffs hereby repeat and reallege the foregoing allegations of this pleading as if fully restated herein.

41. Plaintiff reasonably believes, and therefore alleges, that the programs and activities provided by Quest and/or the State as described herein received federal financial assistance, directly or indirectly, and thus were subject to the Rehabilitation Act. *29 U.S.C. §794(a).*

42. As a consequence of the substantial

physical impairments she was suffering that precluded her from performing many usual life activities, Plaintiff was a "qualified individual with a disability" within the meaning of *29 U.S.C. §794(a)* throughout her dealings and interactions with Defendants.

43. In the manner aforementioned, Defendants discriminated against Plaintiff by denying her the full access to, participation in, and the benefits of the programs and activities that were being provided to non-handicapped individuals. *29 U.S.C. §794(a).* This disparate treatment was imposed upon Plaintiff because of her disabilities.

44. Plaintiff's handicaps were readily apparent to everyone observing her. Her physical inability to perform most typical life functions was thus known to the employees and agents of Defendants. They nevertheless imposed unreasonable burdens upon her and refused to supply her with the readily available accommodations she required.

45. In the manner aforementioned, the employees and agents of Defendants acted intentionally with respect to their mistreatment of Plaintiff and displayed a deliberate indifference to her needs and legal rights as a handicapped individual.

46. Plaintiff is entitled to full compensation for the damages and losses she has suffered, and will continue to suffer, as a direct and proximate result of the violations of *29 U.S.C. §794(a)* by Defendants.

COUNT III
NEGLIGENCE/INTENTIONAL TORT

47. Plaintiffs hereby repeat and reallege the foregoing allegations of this pleading as if fully restated herein.

48. At all times herein relevant, Quest was and is subject to a common law duty that required it to afford due care to Plaintiff and make reasonable accommodations for her safety.

49. Because Plaintiff's presence on Quest's property conferred direct and/or indirect benefits upon the owner and/or occupier of the premises, she qualified as a "business invitee" and was entitled to a heightened duty of protection.

50. Quest's legal responsibilities to Plaintiff were further established in various laws and regulations applicable to it, including those pertaining to accommodations for the handicapped and other safety standards.

51. Through no fault of Plaintiff, Quest carelessly and unjustifiably failed to abide by the aforementioned duties that were owed to her. Quest's negligence and negligence *per se* included, but was not limited to, failing to:

a. provide handicap-accessible facilities;
b. furnish a safe means of travel between floors;
c. hire and properly train staff members to accommodate handicapped individuals;
d. remove hazards posed to handicapped individuals;
e. warn Plaintiff of dangers posed to her; and

f. establish effective procedures to allow residents to receive the medical care, rehabilitation services, and medicine they required.

52. Quest knew, or in the exercise of due care should have known, that it was jeopardizing Plaintiff's health and safety by failing to abide by the aforementioned duties, standards and regulations. Quest thus acted with a deliberate indifference to Plaintiff's rights and safety and in a manner that posed a great risk of harm to her.

53. As a direct and proximate result of Quest's negligent, reckless, and/or malicious wrongdoing as aforementioned, Plaintiff has sustained severe physical injuries, required substantial medical treatment, suffered an impairment of her earning capacity, endured great pain, anxiety, and distress, and has been prevented from performing many usual activities. Plaintiff reasonably believes, and therefore alleges, that these losses will be ongoing.

COUNT IV
INFLICTION OF EMOTIONAL DISTRESS

54. Plaintiffs hereby repeat and reallege the foregoing allegations of this pleading as if fully restated herein.

55. In the manner aforementioned, Quest's employees, agents, and representatives acted in an extreme and outrageous manner which they knew, or reasonably should have known, would cause Plaintiff to suffer extreme embarrassment, distress, and anxiety. They nevertheless took such actions with a conscience disregard of Plaintiff's rights and safety.

56. The stress, anxiety, and embarrassment that were inflicted upon Plaintiff went well beyond the bounds of human decency and were more than any reasonable person with her physical disabilities could be expected to endure.

57. As a direct and proximate result of the intentional acts and omission of Quest's employees, agents, and representatives as aforementioned, Plaintiff has endured severe and debilitating emotional harm. Plaintiff reasonably believes, and therefore alleges, that her suffering in this regard will be ongoing.

COUNT V
LOSS OF CONSORTIUM

58. Plaintiffs hereby repeat and reallege the foregoing allegations of this pleading as if fully restated herein.

59. Plaintiffs, Carol and Richard Haas, are the natural parents of Plaintiff, Rachel Haas.

60. As a direct and proximate result of the acts and omissions of Quest as herein described, Plaintiffs, Carol and Richard Haas, have been denied the companionship, support, and consortium of their daughter. Plaintiffs have further been required to devote considerable time and effort to assist her with her recovery from the damages and losses herein described. Plaintiffs reasonably believe, and therefore allege, that these losses will be ongoing.

PRAYER

WHEREFORE, Plaintiffs demand judgment against Defendants, jointly and severally, for compensatory damages of ONE MILLION DOLLARS ($1,000,000.00). Plaintiffs further request that punitive damages be imposed against Defendant, Quest Recovery Services, Inc., in the amount of FIVE MILLION DOLLARS ($5,000,000.00). Additionally, this Court should assess Defendants, jointly and severally, with reasonable attorney fees and litigation expenses, pre-judgment interest, costs of this action, and any other legal, equitable, or declaratory relief deemed appropriate. Trial by jury is hereby requested upon all issues.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of June, 2004, the foregoing document was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/Paul W. Flowers, Esq.
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